HOTEL DU MINISTÈRE DES AFFAIRES ÉTRANGÈRES, PARIS

COMPTE RENDU DES SÉANCES

DU

TRIBUNAL D'ARBITRAGE

SIÉGEANT A PARIS, 1893

IIIE PARTIE

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19 AVRIL — 2 MAI

REPORT OF THE PROCEEDINGS

OF THE

TRIBUNAL OF ARBITRATION

CONVENED AT PARIS, 1893

PART III

19TH APRIL TO 2ND MAY

and return to their natural liberty and ferocity, without the *animus revertendi*, the property in them ceases.

While this qualified property continues, it is as much under the protection of law as any other property, and every invasion of it is redressed in the same manner. The difficulty of ascertaining with precision the application of the law arises from the *Want of some determinate standard or rule* by which to determine when an animal is ferae vel domitae naturae. If an animal belongs to the class of tame animals, as, for instance, to the class of horses, sheep, or cattle, he is then a subject clearly of absolute property; but if he belongs to the class of animals which are wild by nature, and owe all their temporary docility to discipline of man, such as deer fish, and several kinds of fowl, then the animal is a subject of qualified property, and which continues so long only as the tameness and dominion remain. It is a theory of some naturalists that all animals were originally wild, and that such as are domestic owe all their docility and all their degeneracy to the hand of man. This seems to have been the opinion of Count Buffon, and he says that the dog, the sheep, and the camel have degenerated from the strength, spirit and beauty, of their natural state, and that one principal cause of their degeneracy was the pernicious influence of human power. Grotius on the other hand, says that savage animals owe all their untamed ferocity not to their own natures, but to the violence of man; but the common law has wisely avoided all perplexing questions, and refinements of this kind, and has adopted the test laid down by Puffendorf, by referring the questions whether the animal wild or tame *to our knowlebdge of his habits* derived from fact and experience.

In addition to that, I will refer the Tribunal to two other authorities, and those are decisions of British Tribunals. The first is the case of Davies v. Powell reported in Willes' Reports, and I refer to it on page 44 of my argument. It is also printed in the Appendix, but I do not now refer to the Appendix. In that case the question was whether deer kept in an enclosure, and having certain characteristics, and being used for certain purposes, were distrainable for rent. I may say to those not familiar with the special doctrine of the Common Law of England, that there was a process by which a landlord might recover his rent by going upon the premises of his tenant, and taking property on the premises; but it was confined to personal property; to the question whether deer were distrainable for rent or not involved the question whether they were personal property or not in that particular instance. Now the Court in that case took notice of the proofs which were offered in respect of the character of those particular deer, and the purposes to which they were put, and finding that they were used not for pleasure but for profit — that they were carefully preserved and reared for the beneficial purposes of taking venison from them, furnishing a supply of it to the market, the Court determined that they were personal property and therefore distrainable for rent. The ground was that, although deer belonged to the class of what is commonly designated as wild animals, nevertheless, when they are taken and used by man for the purposes for which it was proved in that case they were taken — when they were treated by man in the way in which they were proved to have been treated in that case, although wild animals, they are used for the same intents and purposes as domestic animals are, and must be classed as personal property, just as domestic animals are classed. Substantially the same decision was made as to the

same animals in the case of Morgan v. Earl of Abergavenny reported in the 8th Common Bench Reports; and there the question was upon the death of an owner of a park, whether deer contained in the park went to the heir of the owner or to his executor. In other words, it was substantially the same question whether they were attached to the soil and formed a part of the realty, and therefore were not distinctly personal property, or whether they went to the executor, being distinctly personal property. In that case a great deal of evidence was gone into upon the trial for the purpose of showing how those particular deer were kept, treated and used in that park, and the whole question of property in live animals was very much gone into and discussed. It was shown by evidence that there was a large number of deer there, that they were cared for, that at times they were fed, that they were in the habit of resorting to particular places in the park, and that from time to time selections were made from the number for slanghter and the victims were sold in the market for venison. All that was proved.

There was a verdict for the plaintiff in that case which was based upon the charge of the Judge to the jury that they might take this evidence into consideration in determining the question whether they are property or not, and the verdict for the plaintiff established that they were the property of the executor and went to the executor, instead of to the heir and were therefore personal property. On a review by the whole Court of that verdict it was decided that this verdict was all part of and relative to the question that it was appropriate to the point whether the animals were property or not, and that it did satisfactorily determine, or was a sufficient ground upon which the Jury might find that the animals were personal property.

Now these authorities to which I have thus alluded are quite sufficient to establish the only point for which I at present cite them, that in order to determine whether an animal commonly designated as wild is the subject of property or not, we must institute an inquiry into the nature and habits of the animal. The general terms " wild " and " tame " are not sufficiently significant for the purpose — it must be a close enquiry into his nature and habits and with the view of seeing whether the nature and habits and the uses to which the animal is put are the same that are characteristic of domestic animals if so they are property the same as domestic animals are.

Now then, what is the case with the fur-seal upon the principles of municipal law ; for I am now answering the question wholly in relation to the doctrines of municipal law. It must be admitted that the case of the fur-seal is a new one in the law. It has nowhere been decided, certainly. But it does not follow that cases, as to whether animals more or less resembling the seal may or may not be the subject of property, have not heretofore arisen and been decided in municipal law. On the contrary, there have been a great many cases decided in respect to animals as to which it was doubtful whether they belonged to the category of

wild or tame, that is if you treat the terms " wild " and " tame " as juridical classifications, or whether their nature and habits were such as to make them properly the subjects of property.

Take the case of wild bees, for instance. There is an animal which lies quite near the boundary line which separates wild from tame animals; and the enquiry was, at an early period in municipal law made, — at a period so early that tradition does not inform us of the first instance when the first case arose, — whether that animal was the subject of property or not. The same question has arisen in reference to wild geeese and swans. Those animals belong to the class commonly designated as wild; but they lie near the boundary, and may sometimes be reclaimed, as it is called, and the question has arisen and been determined whether, when reclaimed, they are, notwithstanding the wildness of their nature, the subject of property.

There is the same question in reference to deer, to pigeons, and other animals.

Now, therefore, we are to examine those instances in which the municipal law has dealt with the case of animals commonly designated as wild, but still have in their nature and habits some characteristics which assimilate them to tame ones. And let us see what conclusion the municipal law arrives at in those particular cases.

Now, in general, they are all exceedingly well stated by the most familiar of authorities in the English law and one of the most eloquent and precise, — I mean Blackstone; and I refer to his treatise on the question. I read from what will be found on page 45 of my argument. He says :

> Other animals that are not of a tame and domestic nature are either not the objects of property at all or else fall under our other division, namely, that of *qualified*, *limited*, or *special* property, which is such as is not in its nature permanent, but may sometimes subsist and at other times not subsist. In discussing which subject, I shall, in the first place, show how this species of property may subsist in such animals as are *feræ naturæ*, or of a wild nature, and then how it may subsist in any other things when under particular circumstances.

Now he is speaking of wild animals which, notwithstanding that they are wild animals, are yet the subject of property.

> First, then, a man may be invested with a qualified, but not an absolute property in all creatures that are *feræ naturæ*, either *per industriam*, *propter impotentiam*, or *propter privilegium*.
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> A qualified property may subsist in animals *feræ naturæ*, *per industriam hominis*, by a man's *reclaiming* and making them tame by art, industry, and education, or by so confining them within his own immediate power that they cannot escape and use their natural liberty. And under this head some writers have ranked all the former species of animals we have mentioned, apprehending none to be originally and naturally tame, but only made so by art and custom, as horses, swine, and other cattle, which, if originally left to themselves, would have chosen to rove up and down, seeking their food at large, and are only made domestic by use and familiarity and are, therefore, say they, called *mansueta*, *quasi manui assueta*. But however well this notion may be founded, abstractly considered, our law apprehends

the most obvious distinction to be between such animals as we generally see tame, and are, therefore, seldom, if ever, found wandering at large, which it calls *domitæ naturæ*, and such creatures as are usually found at liberty, which are therefore supposed to be more emphatically *feræ naturæ*, though it may happen that the latter shall be sometimes tamed and confined by the art and industry of man, — such as are deer in a park, hares or rabbits in an inclosed warren, doves in a dove-house, pheasants or partridges in a mew, hawks that are fed and commanded by their owner, and fish in a private pond or in trunks. These are no longer the property of a man than while they continue in his keeping or actual possession; but if at any time they regain their natural liberty his property instantly ceases, unless they have *animum revertendi*, which is only to be known by their usual custom of returning. A maxim which is borrowed from the civil law, *revertendi animum videntur desinere habere tunc, cum revertendi consuetudinem deseruint.* The law, therefore, extends this possession further than the mere manual occupation; for my tame hawk, that is pursuing his quarry in my presence, though he is at liberty to go where he pleases, is nevertheless my property, for he hath *animum revertendi.* So are my pigeons that are flying at a distance from their home (especially of the carrier kind), and likewise the deer that is chased out of my park or forest, and is instantly pursued by the keeper or forester; all which remain still in my possession, and I still preserve my qualified property in them. But if they stray without my knowledge, and do not return in the usual manner, it is then lawful for any stranger to take them. But if a deer, or any wild animal reclaimed, hath a collar or other mark put upon him, and goes and returns at his pleasure, or if a wild swan is taken and marked, and turned loose in the river, the owner's property in him still continues, and it is not lawful for anyone else to take him; but otherwise if the deer has been long absent without returning, or the swan leaves the neighbourhood. Bees also are *feræ naturæ;* but when hived and reclaimed, a man may have a qualified property in them, by the law of nature as well as by the civil law. And to the same purpose, not to say in the same words with the civil law, speaks Bracton; occupation, that is, hiving or including them, gives the property in bees; for, though a swarm lights upon my tree, I have no more property in them till I have hived them than I have in the birds which make their nests thereon; and, therefore, if another hives them, he shall be their proprietor; but a swarm, which fly from and out of my hive, are mine so long as I can keep them in sight and have power to pursue them, and in these circumstances no one else is entitled to take them. But it hath been also said that with us the only ownership in bees is *ratione soli,* and the charter of the forest, which allows every freeman to be entitled to the honey found within his own woods, affords great countenance to this doctrine, that a qualified property may be had in bees, in consideration of the property of the soil whereon they are found.

In all these creatures, reclaimed from the wildness of their nature, the property is not absolute, but defeasible; a property that may be destroyed if they resume their ancient wildness, and are found at large. For if the pheasants escape from the new, or the fishes from the trunk, and are seen wandering at large in their proper element, they become *feræ naturæ* again, and are free and open to the first occupant that has ability to seize them. But while they thus continue my qualified or defeasible property, they are as much under the protection of the law as if they were absolutely and indefeasibly mine, and an action will lie against any man that detains them from me or unlawfully destroys them. It is also as much felony by common law to steal such of them as are fit for food as it is to steal tame animals, but not so if they are only kept for pleasure, curiosity, or whim; as dogs, bears, cats, apes, parrots and singing birds; because their value is not intrinsic, but depending only on the caprice of the owner; though it is such an invasion of property as may amount to a civil injury, and be redressed by a civil action. Yet to steal a reclaimed hawk is felony both by common law and statute; which seems to be a relic of the tyranny of our ancient sportsmen. And, among our elder ancestors, the ancient Britons, another species of reclaimed animals, namely cats, were looked upon as creatures of intrinsic value; and the killing or stealing one was a grie-

vous crime, and subjected the offender to a fine; especially if it belonged to the kings's household, and was the *custos horrei regii,* for which there was a very peculiar forfeiture. And thus much of qualified property in wild animals, reclaimed *per industriam.*

The title which is attached to this species of property, property *per industriam*, is significant as to the foundation upon which it rests. It is property created by the art, industry and labour of man. It points out that this labour, art and industry would not be called into activity and would not produce this useful and beneficial result unless it had the reward of property in the product of it, and that, therefore, the law assigns to such animals the benefits and the protection of property, for the purpose of encouraging the industry which creates it.

Now that is the language of Blackstone, which is taken almost bodily from another earlier writer in the law of England, I mean Bracton and was by him, undoubtedly, derived from the civil law in which all, or nearly all, of these doctrines were established at a very early period indeed. At a very early period in the development of the Roman Law these doctrines were established; and I now call the attention of the Tribunal to further extracts from writers upon municipal law. I am going to read from page 108 of the Argument, and, first, from Studies in the Roman law by Lord Mackenzie, a well known authority. He says :

Wild animals. All wild animals, whether beasts, birds or fish, fall under this rule, so that even when they are caught by a trepasser on another man's land they belong to the taker, unless they are expressly declared to be forfeited by some penal law. Deer in a forest, rabbits in a warren, fish in a pond, or other wild animals in the keeping or possession of the first holder, cannot be appropriated by another unless they regain their liberty, in which case they are free to be again acquired by occupancy. Tame or domesticated creatures, such as horses, sheep, poultry and the like, remain the property of their owners, though strayed or not confined. The same rule prevails in regard to such wild animals already appropriated as are in the habit of returning to their owners, such as pigeons, hawks in pursuit of game, or bees swarming while pursued by their owners.

Then I will read an extract from a very ancient authority in the Roman law, Gaius :

In those wild animals, however, which are habituated to go away and return, as pigeons, and bees, and deer, which habitually visit the forests and return, the rnle has been handed down that only the cessation of the instinct of returning is the termination of ownership and then the property in them is acquired by the next occupant; the instinct of returning is held to be lost when the habit of returning is discontinued.

I will now read from another celebrated writer in the civil law, Von Savigny. He says :

With respect to the possession of animals these rules are to be applied thus :
First, tame animals are possessed like all other movables *i, e.*, the possession of them ceases when they can not be found. Second : wild animals are only possessed so long as some special disposition (custodia) exists.

I do not know that " disposition " is a very happy translation of that word.

Which enables us actually to get them into our power. It is not every custodia, therefore, which is sufficient; whoever, for instance, keeps wild animals in a park, or fish in a lake, has undoubtedly done something to secure them, but it does not depend on his mere will, but on a variety of accidents, whether he can actually catch them when he wishes, consequently, possession is not here retained; quite otherwise with fish kept in a stew, or animals in a yard, because then they may be caught at any moment. Third, wild beasts, tamed artificially, are likened to domestic animals, so long as they retain the habit of returning to the spot where their possessor keeps them.

I now read from another celebrated writer, not upon municipal law, but upon the law of nature and nations, viz. Puffendorf. He says :

Although a loss seems to refer properly to property, yet by us it will be generally accepted as embracing all injury that relates to the body, fame and modesty of man. So it signifies every injury, corruption, diminution or removal of that which is ours, or interception of that which in perfect justice we ought to have; whether given by nature or conceded by an antecedent human act or law; or, finally, the omission or denial of a claim which another may have upon us by actual obligation.

To this tends the 13th Declamation of Quintilian, where he plainly shows that one had inflicted a loss who poisoned the flowers of his own garden whereby his neighbour's bees perished. Yet the convincing reason consists in this : Since all agree that bees are a wandering kind of animate life, and because they can in no way be accustomed to take their food from a given place; therefore whenever there is a right of taking them, there also, it is understood, is laid a general injunction to be observed by all neighbours to permit bees to wander every where without hinderance from any one.

The passage from Bracton which follows I omit to read because it is expressed by Blackstone almost in the same terms.

The doctrine is stated very intelligibly and clearly by Bowyer (see U. S. argument p. 110) a writer upon the Civil Law :

Wild animals, therefore, and birds and fish and all animals that are produced in the sea, the heavens, and the earth, become the property by natural law, of whoever takes possession of them. The reason of this is that whatever is the property of no man becomes by natural reason the property of whoever occupies it.

It is the same whether the animals or birds be caught on the premises of the catcher or on those of another. But if any one enters the land of another to sport or hunt, he may be warned off by the owner of the land. When you have caught any of these animals it remains yours so long as it is under the restraint of your custody. But as soon as it has escaped from your keeping and has restored itself to natural liberty, it ceases to be yours, and again becomes the property of whoever occupies it. The animal is understood to recover its natural liberty when it has vanished from your sight, or is before your eyes under such circumstances that pursuit would be difficult.

Here we find the celebrated maxim of Gaius *Quod nullius est, id ratione naturali occupanti conceditur.* It is founded on the following doctrine : Granting the institution of the rights of property among mankind those things are each man's property which no other man has a right to take from him. Now, no one has a right to that which is *res nullius;* consequently, who ever possesses *rem nullius* possesses that which no one has a right to take from him. It is therefore his property.

I now pass on to nearly the middle of page 111 of the U. S. Argument :

The general principle respecting the acquisition of animals *feræ naturæ* is, that it is absurd to hold anything to be a man's property which is entirely out of his power. But Grotius limits the application of that principle to the *acquisition* of things, and therefore justly dissents from the doctrine of Gaius given above, that the animal becomes again *res nullius* immediately on recovering its liberty, if it be difficult for the first occupant to retake it. He argues that when a thing has become the property of any one, whether it be afterwards taken from him by the act of man, or whether he lose it from a natural cause, he does not necessarily lose his right to it together with the possession; but that it is reasonable to presume that the proprietor of a wild animal must have renounced his right to it when the animal is gone beyond the hope of recovery and where it could not be identified. He, therefore, argues that the right of ownership to a wild animal may be rendered lasting, notwithstanding its flight, by a mark or other artificial sign by which the creature may recognized.

Mr Justice Harlan. — You notice the last paragraph from that citation.

Mr Carter. — Yes, the last paragraph from Bowyer on page 112 is pertinent. He says :

With regard to creatures which have the habit of going and returning, such as pigeons, they remain the property of those to whom they belong so long as they retain the *animus revertendi* or disposition to return. But when they lose that disposition they become the property of whom-soever secures them. And they must be held to have lost the animus revertendi as soon as they have lost the habit of returning. Such are the doctrines of the Roman law, which are conformable to the English law, with the qualification of Grotius, which is applicable to the case of all animals *feræ naturæ*, that is to say, that a mark or collar prevents the rights of the proprietor of a wild animal being extinguished by its escape from his sight and pursuit.

Now I will call the attention of the tribunal to a decision in an American tribunal in the Supreme Court of the State of New York, one of the Courts enjoying the highest authority in the United States, especially enjoying the highest authority at the time this decision, was given. It is the case of *Amory* v. *Flynn*, 10th Johnson's Reports, page 102. It is contained in page 116 of my argument. In that case one Amory, brought an action of trover, as it is called in the English law against one Flynn before a Justice of the Peace for two geese — that is to say he brought an action for damages for a trespass done to him in taking geese which he alleged to be his property :

The plaintiff proved a demand of the geese and a refusal by the defendant unless the plaintiff would first pay 25 cents for liquor furnished to two men, who had caught the geese and pledged them to the defendant for it. The geese were of the wild kind, but were so tame as to eat out of the hand. They had strayed away twice before, and did not return until brought back. The plaintiff proved property in them, and that after the geese had left his premises the son of the defendant, was seen pursing them with dogs and was informed that they belonged to the plaintiff. The jury found a verdict for the defendant, on which the justice gave judgment.

There was a case where Geese, wild by nature, had been reclaimed by man to such an extent that they were wonted to a particular spot and yet

were in the habit of straying off away from it, and having strayed off upon a certain occasion, another man took them, and he handed them over to still another man, and that other refused to give them up on demand. The question was whether the possessor of them had a property in them. It appears to have been held in the Court below that he had no property, but the supreme Court say in giving judgment :

> The Geese ought to have been considered as reclaimed so as to be the subject of property. Their identity was ascertained; they were tame and gentle and had lost the power or disposition to fly away.
>
> They had been frightened and chased by the defendant's son, with the knowledge that they belonged to the plaintiff, and the case affords no colour for the inference that the geese had regained their natural liberty as wild fowls, and that the property in them had ceased. The defendant did not consider them in that light, for he held them in consequence of the *lien* which he supposed he had acquired by the pledge. This claim was not well founded, for he showed no right in the persons who pawned them for the liquor so to pawn them, and he took them at his peril.
>
> Here was clearly an invasion of private right.

I will now call attention to another decision of the same Supreme Court of New York — a later decision which is reported in 15 th volume of Wendell. So much as we have printed of it is at page 117 of the argument. The propositions which are prefixed to the report in the case, as being those which were decided by the court, are these :

> The owners of *bees* which have been reclaimed, may bring an action of *trespass* against a person who cuts down a tree into which the bees have entered *on the soil of another*, destroys the bees and takes the honey.
>
> Where bees take up their abode in a tree, they belong to the *owner of the soil*, if they are *unreclaimed*, but if they have been *reclaimed*, and their owner is able to identify his property, they do not belong to the owner of the soil, but to him who had the former possession, although he cannot enter upon the lands of the other to retake them without subjecting himself to an action of trespass.

Now the facts of that case appear to be this : One Kilts had brought an action against Goff, in a justice's court, in the nature of an action for trespass, for taking and destroying a swarm of bees and the honey made by them.

> The swarm left the hive of the plaintiff, flew off and went into a tree on the lands of the Lenox Iron Company. The plaintiff kept the bees in sight, followed them, and marked the tree into which they entered. Two months afterwards the tree was cut down, the bees killed, and the honey found in the tree taken by the defendant and others.
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> The plaintiff in his suit before the justice recovered a judgment, and that was affirmed on appeal by the Court of Common Pleas of the County where the suit was brought.
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> The defendant then carried the case, by what is called a writ of error, to the Highest Court of the State of New-York, at that time the Supreme court — not the highest appellate Tribunal, but called the supreme court. And Mr Justice Nelson, very celebrated in jurisprudence in the United

States as one of the most distingushed judges, gave the opinion of the Court. He says :

Animals *feræ naturæ*, when reclaimed by the art and power of man, are the subject of a qualified property; if they return to their natural liberty and wildness without the *animus revertendi*, it ceases. During the existence of the qualified property it is under the protection of the law the same as any other property, and every invasion of it is redressed in the same manner. *Bees* are *feræ naturæ*, but when hived and reclaimed, a person may have a qualified property in them by the law of nature, as well as the civil law. Occupation, that is hiving or enclosing them, gives property in them. They are now a common species of property, and an article of trade, and the wildness of their nature, by experience and practice, has become essentially subjected to the art and power of man. An unreclained swarm, like all other wild animals, belongs to the first occupant in other words, to the person who first hives them; but if the swarm fly from the hive of another, his qualified property continues so long as he can keep them in sight, and possesses the power to pursue them. Under these circumstances, no one else is entitled to take them.

Now the case decided by the Court of Common Bench in Great Britain and which I have already referred to — (that is the Case of Morgan and another against the Earl of Abergavenny) — is printed almost *in extenso* on page 119 of our argument. It is too long to be read, but the whole of it has been printed, in order that the Tribunal may observe the circumstances under which that case arose, and thus ascertain the precise point which was decided. I will call the attention of the Arbitrators, and will read, the paragraph near the bottom of the page 125. I have said that in that case, the question being whether deer were property or not, evidence was given tending to show their nature and habits, and the purposes to which they were applied. The Court says :

In considering whether the evidence warranted the verdict upon the issue, whether the deer were tamed and reclaimed, the observations made by Lord Chief Justice Willes in the case of Davies v. Powell, are deserving of attention. The difference in regard to the mode and object of keeping deer in modern times from that which anciently prevailed, as pointed out by Lord Chief Justice Willes, cannot be overlooked. It is truly stated that ornament and profit are the sole object for which deer are now ordinarily kept, whether in ancient legal parks, or in modern inclosures so called; the instances being very rare in which deer in such places are kept and used for sport; indeed, their whole management differing very little, if at all, from that of sheep, or of any other animals kept for profit. And in this case, the evidence before adverted to was that the deer were regularly fed in the winter, the does with young were watched; the fawns taken as soon as dropped, and marked; selections from the herd made from time to time, fattened in places prepared for them, and afterwards sold or consumed, with no difference of circumstance than what attached, as before stated, to animals kept for profit and food.

As to some being wild, and some tame, as it is said, individual animals, no doubt, differed, as individuals in almost every race of animals are found, under any circumstances to differ, in the degree of tameness that belongs to them. Of deer kept in stalls, some would be found tame and gentle, and others quite irreclaimable, in the sense of temper and quietness.

Upon a question whether deer are tamed and reclaimed, each case must depend upon the particular facts of it; and in this case the court think that the facts were such as were proper to be submitted to the Jury; and, as it was a question of fact for the Jury, the court cannot perceive any sufficient grounds to warrant it in

saying that the Jury have come to a wrong conclusion upon the evidence, and do not feel authorized to disturb the verdict.

Now the case therein referred to, and the decision therein referred to, with approval, by the late Lord Chief Justice Willes, was the case of *Davies Powell*, a report of which is printed on page 126. The argument of the questions is stated upon page 127.

And the single question that was submitted to the Judgment of the court is whether these deer under these circumstances, as they are set forth in the pleadings, were distrainable or not.

It was insisted for the plaintiff that they were not;

(1) Because they were *feræ naturæ*, and no one can have absolute property in them.

(2) Because they are not chattels, but are to be considered as hereditaments and incident to the park.

(3) Because, if not hereditaments, they were at least part of the thing demised.

(4) Their last argument was drawn *ab inusitato*, because there is no instance in which deer have been adjudged to be distrainable.

Now the learned judge goes on :

First. To support the first objection, and which was principally relied upon by Counsel for the plaintiff, they cited Finch, (and other authorities on property), and several other old books, where in it is laid down, as a rule, that deer are not distrainable; and the case of Mallocke, v. Eastley, 3 Lev. 227, where it was holden that trespass will not lie for deer, unless it appears that they are tame and reclaimed. They likewise cited 3 Inst. 109, 110, and 1 Hawk. P.C. 94, to prove that it is not felony to take away deer, conies, etc., unless tame and reclaimed.

I do admit that it is generally laid down as a rule in the old books that deer, conies, etc., are *feræ naturæ*, and that they are not distrainable; and a man can only have a property in them *ratione loci*. And therefore in the case of swans, (7Co. 15, 16, 17, 18) and in several other books there cited it is laid down as a rule that where a man brings an action for chasing and taking away deer, hares, rabbits, etc., he shall not say *suos*, because he has them only for his game and pleasure *ratione privilegii* whilst they are in his park, warren etc. But there are writs in the register (fol 102), a book of the greatest authority, and several other places in that book which show that this rule is not always adhered to. The writ in folio 102 is *quare clausum ipsius. A. Freget et intravit, et cuniculos suos Cepit*.

The reason given for this opinion in the books why they are not distrainable is that a man can have no valuable property in them. But the rule is plainly too general, for the rule in Co. Lit. is extended to dogs, yet it is clear now that a man may have a valuable property in a dog. Trover has been several times brought for a dog, and great damages have been recovered. Besides the nature of things is now very much altered, and the reason which is given for the rule fails. Deer were formerly kept only in forests or chases, or such parks as were parks either by grant or prescription, and were considered rather as things of pleasure than of profit; but now they are frequently kept in inclosed grounds which are not properly parks, and are kept principally for the sake of profit, and therefore must be considered as other cattle.

I next read from page 129.

Fourth. The last argument, drawn *ab inusitato*, though generally a very good one, does not hold in the present case.

When the nature of things changes, the rules of law must change too. When it was holden that deer were not distrainable it was because they were kept principally for pleasure and not for profit, and were not sold and turned into money as they are now. But now they are become as much a sort of husbandry as horses, cows, sheep, or any other cattle. Whenever they are so and it is universally known, it would be ridiculous to say that when they are kept merely for profit they are not distrainable as other cattle, though it has been holden that they were not so when they were kept only for pleasure. The rules concerning personal estates, which were laid down when personal estates were but small in proportion to lands, are quite varied both in courts of law and equity now that personal estates are so much increased and become so considerable a part of the property of this kingdom.

Now, from all those authorities, drawn from the municipal law of many different nations, confirmed by the ancient Roman law, these propositions are exceedingly clear : That, in respect to wild animals, if by the art and industry of man they may be made to return to a particular place, to such an extent that the possessor of that place has a power and control over them, which enables him to deal with them as if they were domestic animals, they are, in the law, likened to domestic animals ; and are made property, just as if they were domestic animals ; and that property continues not only while they are in the actual custody of the possessor of the particular place, but when they are away from his custody, and no matter how far away, so long as they have an intention of returning to it. The property in them ceases only when this intention ceases ; and the cessation of that intention is to be inferred, and can only be inferred, from a cessation of the habit of returning. When they have abandoned that habit and have returned to their ancient wildness — then they cease to be property, and may be taken by any person without an invasion of property right. And you may state another proposition fully substantiated by these anthorities — it is scarcely another proposition, it is almost the same ; but the language is somewhat different, and I may be justified therefore, in stating it in a different form : That wherever man is capable of establishing a husbandry in respect of an animal commonly designated as " wild " — such a husbandry as is established in reference to domestic animals so that he can take the increase of the animals and devote it to the public benefit, by furnishing it to the markets of the country — in such cases the animal, although commonly designated as " wild ", is the subject of property, and remains the property of that person as long as the animal is in the habit of voluntarily subjecting himself to the custody and control of that person. Those are doctrines of the municipal law everywhere agreed ; there is no dissent that I am aware of in reference to them, and being universally admitted doctrines of municipal law, they may be taken, I apprehend, in the absence of evidence to the contrary.

Sir Charles Russell. — You must not take that.

Mr Carter. — I must not do what?

Sir Charles Russell. — You must not assume that I agree with that statement.

Mr Carter. — I do not assume that you agree with anything I say.

Sir Charles Russell. — You say it is universally admitted. I should not have interposed but that my friend said it was universally admitted.

Mr Carter. — Well, I must understand a permanent exception for that : but I am not surely, to be deprived of the use of the word " general ", or " universal", because it may be held to include my learned friend. Let it be understood that I do not mean it include him. So far as my knowledge extends these doctrines are universally acceded to.

The President. — What would be your legal definition of the word " husbandry " which you have just used? Would it be merely the fact of gathering the increase of an animal?

Mr Carter. — Yes.

The President. — That is enough to constitute " husbandry " in your view?

Mr Carter. — Taking an animal caring for it, preserving the stock and and taking the increase for the markets for the community — that is husbandry, I submit.

Mr Phelps. — And protecting it.

Mr Carter. — The same sort of husbandry that is exercised in respect of sheep, horses, cattle, and any other of our domestic animals.

The President. — I would rather stand by your definition, than by your simile.

Mr Carter. — It seems to me that the definition is good, and it seems to me that the analogies of the animals to which I allude, are appropriate.

Now there are certain observations which I shall venture to make respecting the law so far as I conceive myself to have established it, so far as I have stated. I mean in the first place that it is uniform in all countries, and that it may therefore be taken safely as international : Secondly; that it is not founded on legislation but upon the principles of the law of nature developed in the municipal Codes and by the decisions of judicial Tribunals founded upon the law of nature; that that doctrine is made to turn upon the existence of an *animus revertendi*, but that *animus revertendi* must be of itself wholly unimportant; it is indeed a mere conjecture anyway. What do we know about the *animus* of one of these wild animals? All we know of the intention of a wild animal is that exhibited by its habits; and the law says that the evidence is to be inferred only from its habits.

As long as the habit of returning exists the intention exists; and when the habit of returning ceases, why the intention to return is held to cease.

Well, of what consequence, in itself considered, is this habit of returning unless it has some special use and purpose? Why should it be said that a wild animal is the subject of property if it has the habit of returning to the same place, and is not the subject of property if it has not that habit and ceases to be the subject of property when once it has lost that habit? Why should we say that? There must bea reason for it. Can it be any other thing than the habit of man to treat the animal in

the same way that he treats domestic animals and makes the animal subserve the same useful and domestic purposes which domestic animals subserve, — plainly that must be the reason.

Take the case of wild swans and geese. They are generally held not to be the subject of property; the law, however, takes notice of the exception where those animals have been so far reclaimed that they will continually and habitually resort to a particular place. Either the law says they are property and so long as they have that intention nobody can lay hands on them wherever they are, whether in that particular place or not, — but why does the law say that? Because there is a public utility which may be gathered by that. If you allow the possessor of the place to which they resort to have the right of property in them, he will devote himself to the business of reclaiming those animals; and, consequently, the world or society will be supplied with those animals whereas otherwise they would not. Property is the price which society must pay for the benefit which those animals produce. They are the product of the art and the industry and the labour which is expended upon them; and for that product, why, the benefit of property is awarded to the person who exhibits that art and industry.

The President. — Do you mean to go so far as to say that the seals revert to the Pribilof islands on account of the industry of man?

Mr Carter. — I hope the President will excuse my answering at present. I will complete the analogy.

The President. — Yes. It is perhaps anticipating.

Mr Carter. — My argument will not be anticipated, Sir, because I shall not fail to complete the analogy.

I look now to these other questions. Take deer; why is it, as long as deer are kept for the purpose of sport, the law will not regard them as property? Because as long as they are kept for such purposes, they subserve no useful social purposes; but the moment man undertakes to take care of them and feed them and, so to say, reclaim them and treat them as domestic animals and supply the markets of society with venison from them, then in a moment he is awarded the rights of property in them.

That is because he is doing a useful public service; because it is a public service that would not be performed unless it was paid for, and because it can be paid for only by an award of the right of property to the man who thus expends his labour. Take the case of bees. Nothing can be more wild in their nature than a bee. That nature is not in the slightest degree changed when a hive is put inside of a box on the premises of a particular individual; and that is all that it is necessary to do, — to take the hive and put it inside a box. But what is the consequence of that? The consequence of that is that a supply of honey may be taken from that animal and a much greater supply of honey than if you were driven to hunt through the woods to find hives. The consequence is that when the hive swarms, the swarm can be taken and put in another box, and thus the number of swarms is multiplied indefinitely and the production

of honey indefinitely increased. That is a great service to society and to the public. It furnishes it with an article of great utility which otherwise it would not have, or would not have in anything like the same degree of abundance; and, therefore, the art and industry, small though it be, which is expended on those particular bees is rewarded by assigning to the possessor of the place where the hives are the right of property in the bees. When a hive swarms, he can pursue it off his own premises on to the premises of another man. It remains his property, and, as it appears from the decision, I read to the learned Arbitrators, if they go on to the premises of another person who will not permit the owner of the swarm to come on there and get them, they still remain his property; and if they are appropriated by the owner of the land where they took refuge he is guilty of a trespass.

Now, all those privileges are awarded to the owners of bees as a reward or encouragement to them for producing the bees. It is an appeal to the great motive of self-interest, so powerful in human affairs and which is the foundation of a great part of all the blessings of society. It is calling into activity a care, industry, labour and diligence which would not otherwise be exerted.

I might adduce instances of other animals; but the learned Arbitrators will perceive what the rule is which has been established, the different animals to which it is applied, and the obvious grounds upon which the doctrine is based.

Now let me see whether those doctrines apply to the case of the fur seal or not. Well, it is only necessary, and I shall not here allude but to few of the characteristies of the fur seal. In the first case he comes upon the Pribilof islands voluntarily, and there submits himself absolutely to the control, custody and disposition of the owner of that place. He is defenceless against man; still he voluntarily comes there, and submits himself to the power of man. In the next place, he returns to that spot by the most imperious of all animal instincts. Nothing can stop him unless he is driven away. Although his absence from that particular spot is very prolonged, and the distance over which he travels is very great, that instinct to return is never for a moment absent. It is superior, and very far superior to any instinct that a deer may have to go to a particular place, or wild swans, or geese, or pigeons, or animals of that sort. The seal will go through all obstacles and all dangers, and certainly return to that spot.

Now what is the social utility? Why, that one is enabled to practice a species of husbandry in reference to him. He can take the annual increase of that animal without in any respect diminishing the stock. In other words, he can deal with the animal, precisely as he does with domestic animals, precisely as if the animal were domestic; and, therefore we find here all the elements, all the foundations upon which Blackstone classes " property *per industriam* ". You may ask what care, what industry man practises in reference to the seal. He does not take and teach him to return; he does not laboriously " wont " him to this

particular spot. The animal is inclined to come there any way, but you will perceive upon a very little reflexion the degree of care and industry which is exercised. In the first place, the United States (and Russia before the United States) carried thither to these islands several hundred people, and they constituted a guard over those islands and preserved the seals and protected them against all other dangers except that of being slaughtered in the manner in which I have described — a very great labour, a great deal of expense. The seals are invited to come to that island. No obstacle is thrown in their way. Their annual return is cherished in every way in which it can be cherished; very great expense is undergone in extending this sort of protection over them. In the next place, and what is particularly important, the United States, and Russia before the United States practised a self-denial and abstinence in reference to that animal. They did not club him on the head, the moment he landed and apply him to their purposes indiscriminately, male and female. They did not take that course; they carefully avoided it and practised a self-denial in reference to it, and that self-denial and the other incidents of care and industry which I have mentioned, leads those seals to come to that island year after year, where they thus submit themselves to human power, so as to enable the whole benefit of the animal to be applied to the uses of man.

Now let me ask what would have been the case if this care and industry had not been applied. Suppose the art and industry of the United States and its self denial had not been applied, what would have been the result? We have only to look to the fate of the seals in other quarters of the globe where no such care was exercised to learn what would have been the result. They would have been exterminated a hundred years ago; that herd would not exist there now, could not exist. Every marauder who thought he could make a profitable voyage by descending on that island in the hope of getting seals would have gone there and killed indiscriminately all that he could find, and the herd would have been exterminated, just as such herds have been exterminated in every other quarter of the globe where this care has not been exercised in reference to it. Therefore I respectfully submit to you that the present existence of that on that island, where the life of every one of those seals, be they 1000 or be they 500,000, is the direct product of the care, industry, labour and expense of the United States, and they could not be there except for that care and industry. What is contended for on the part of Great Britain here is the right to prey, on a herd of animals which are in every sense the creation of the labour and industry of the United States, and which would not exist at all — would not exist for the world and would not exist even for them to prey upon them, except for the exercise of that care and industry. There is no contradicting that position at all; it is not susceptible of denial or of doubt; it is absolutely certain that this herd would not exist to-day on the Pribilof Islands nor on any day within the last half century but for the exercise of the care and industry

and the self-denial of Russia and her successors the United States.

Now, if the exercise of those qualities in the cases of the wild swan, of deer, of bees, of rabbits, and of the other animals to which we allude are sufficient grounds and reasons why an award of property should be made to those who exhibit the care and industry which creates them, why should not it be made in this case? Therefore, I say that upon the plain doctrines of the municipal law, going no further than them, the position of the United States that these seals are the subject of property, and that they belong to the United States not only while they are on the Islands but at all times during their migrations, near or remote, — that that proposition is fully established by the doctrines of municipal law.

Now I might properly leave the argument here, and I conceive that the question is here clearly and conclusively argued, — the propositions in respect to property, which I have shewn to be true in reference to other animals wild in their nature but reclaimed by man are true in respect to seals. There are, indeed, differences between the seals and these other animals, but the differences are wholly immaterial to the question in dispute. They do not affect it at all; the right of property is awarded in these instances for social reasons and in consequence of the great social benefits; and these social reasons and social benefits are as strong, indeed, I may say much stronger, in the case of the seals than they are in the case of any of the other animals to which allusion has been made as being the subject of property after they are reclaimed.

You may say, or it may be said, that, in the case of the other animals like wild geese and swans and deer, that the disposition to return has been created by man. Well, suppose it was created by man in their case and not created by man in the case of the seals; would that make any difference? No. Public and social benefits, which result in the one case from an award of property, are the same as in the case of the other, but this suggestion is not true that the instinct is created in the case of other animals and exists naturally in the case of seals. The instinct to return is natural in all the cases alike. Man only acts upon it, and he acts upon it in the one case just as he acts upon it in the other. If there was not a natural instinct to return in the case of wild geese and swans, they could not be made to return. It is their native qualities, their natural instincts, which are acted upon by the art and industry of man and which produce the useful result; and they are acted upon in the case of seals just as much as they are acted upon there. Of course, it is true that the wanderings of the seals from the places to which they thus resort are much wider and more protracted than in the case of other animals; but has it ever been suggested in the case of other animals that the question whether an award of property could be made or not depended on the extent of their wanderings? Not at all.

No matter how widely they may stray; no matter how long they may be absent, so long as you can say the *animus revertendi* remains, so long the property exists and will be protected. And in respect to seals you may

say with a certainty and with an absoluteness which cannot be declared in reference to other classes of animals that the *animus revertendi* does always exist. It may be said, and indeed is said, as I observe in the arguments of my learned friends on the other side, that the seals do not return to the same particular spot. They do return to the Pribilof Islands indeed, it is said, but they sometimes may go one year to the island of Saint-George and another year to the island of Saint-Paul. Of what consequence is that? That may well enough be true for aught we know ; and I shall not take pains to undertake to show that it is not true, for it is a circumstance of absolutely no importance. The only important thing about it is, that the animals should return to their human owner, — that they should return to the custody of the owner who has exhibited the care and diligence which enables him to put that return to advantage.

Now, all these islands are the property of one proprietor, and all the benefits which can possibly arise from the return of an animal to a particular place and a submission of himself to the power of man, can be repeated in the case of the seals. It is suggested that you are not certain that the seals that came this year are the same seals that were there last year; and it is suggested that there is an intermingling between the two herds on the two sides of the Pacific Ocean ; that seals which frequent the Commander islands belonging to Russia are found mingled with the herds which come to the Pribilof islands. That is all conjecture. There is not an item of evidence tending to show that any such a mingling as that is true in point of fact. It is against the teaching of Natural History. It is against everything which we know in reference to the habits of this particular herd. All parties were agreed, until it became of some importance to suggest some failure of identification, that this particular herd that visits the Pribilof islands confines itself to the western coast to America. It goes nowhere else. These islands are its sole places of resort for the purpose of breeding; and it is a certainty which any Court of Justice would act upon anywhere that any seal found upon the western coast of America belongs to that particular herd, and will make those islands his home.

The Président. — Would you call the Pribilof islands the home of those seals? I suppose the *animus revertendi*, as you explaincd it with reference to other animals, is such that the animal reverts to its usual haunts and to its home; but would you say the same with regard to the seals?

Mr Carter. — Well, I call the Pribilof islands their home. I am not particular about the name applied to it. You may call it their principal resort, or breeding ground, or what not.

The President. — Their principal place of abode.

Mr Carter. — Whatever you call it, the fact is clear that they go there for the purpose of breeding. They stay there for 5 months of the year, and bring forth their young there ; and you can there easily separate the

superfluous males from the herd for the purpose of supplying them to the commerce of the world. Names, of course, are unimportant, it is the facts here which determine that.

Now I have said that these doctrines are clear upon the settled rules of municipal law, and without going into any reasons which we do not find plainly apparent upon the doctrine of municipal law. But I am not disposed to leave the question there, because the argument can be strengthened.

I have said nothing about the principles and rules upon which the institution of property generally stands. The institution of property is anterior to municipal law or anterior at least to any considerable degree of development in municipal law. It is assumed to exist by municipal law, and it is only in these comparatively rare instances — exceptional instances — such as swans, bees, pigeons, and deer, that the question of the foundations of the institution of property have been inquired into by those who administer the municipal law. There are those instances.

But what if we shall inquire into the foundation of property generally and see what that stands on. Why is it that the institution of property exists at all? Why is it that one man is permitted to own 100 000 acres, if you please, of earth's surface, and another man have not where to lay his head? Why is it that society permits one man to hold, and defends him in holding store houses and magazines of provisions while another is starving of hunger.

Now those lines cannot be arbitrary. Institutions like that cannot be the creatures of chance — cannot rest upon any arbitrary rules — they must stand upon great social grounds, and therefore it is very pertinent to inquire what those social grounds are, and I therefore invite this Tribuinal to accompany me in a somewhat larger inquiry which is very pertinent to the matter which is now before us; an inquiry as broad as the social interests of all Nations which this Tribunal is supposed to represent.

The President. — If you want to take us into a discussion of socialistic theories I suggest that would be too broad for this inquiry.

Mr Carter. — Yes, but I do not object to discuss socialistic theories, provided I reduce them into some brief compass.

Mr President has reminded me of an observation of one of his countrymen, called illustrious by his friends, and, I suppose, denounced as notorious by his enemies. Some Frenchman has said that property was "robbery" and Prudhon was right. Property *is* robbery; unless you can defend it on some great social grounds, and by supporting it upon some great social benefits. If you can show that it is necessary to society, necessary to improvements, necessary to civilization and necessary to progress, then you can defend it; otherwise it is robbery.

Now what is property? It is sometimes said to be the right to the exclusive enjoyment of a thing; but it rather indicates the jural right which belongs to it, and which is attached to it, and not the thing itself.

What is it? I think it is well expressed by two writers to which I will call attention. It is very hard to define what property is. We can feel it, but it is hard to define it. I will now read from page 51. Savigny says :

> Property, according to its true nature, is a widening of individual power.

It is as far as tangible things are concerned, an extension of the individual to some part of the material world, so that it is affected by his personality.

And the philosopher Locke expresses the same idea. He says :

> The fruit or venison which nourishes the wild Indian ..... must be his, and so his (that is, a *part of him*) that another can no longer have any right to it.

And a German writer of great distinction, Ihering, gives substantially the same definition of it :

> In making the object my own I stamped it with the mark of my own person. whoever attacks it attacks me; the blow struck it strikes me, for I am present in it; Property is but the periphery of my person extended to things.

A very happy definition of what property really is. It is part of the person, and whoever touches the property of a person touches him, and whoever touches the property of a nation touches the nation itself. Well, that is a description of the thing itself.

Now what is the right on which it is founded? In going into this enquiry as to what the right of property is founded on, I am not going to deal with any abstract question, nor am I going to deal with questions that have not been considered as the province of jurists, on the contrary I am entering on a question which has been from the first considered peculiarly the province of jurists, and especially of jurists dealing with the law of nature and the law of nations. The great writers on the law, beginning with Grotius, have considered that no ethical system was complete, and consequently no system of the law of nature and nations was complete which did not deal with the institution of property and the foundations upon which it rested, and in what I am going to say on that point I shall be doing little more than recall views which have been before stated and developed by very many different writers. Possibly I may carry them a little farther in the development, but for the most part I shall only repeat what has been said before me.

Now these writers, in endeavoring to ascertain the foundation of the institution of property, taking first into consideration its universal prevalence everywhere, all over the globe and in every stage of human history, recognized at once the fact that it is must be founded upon the facts of man's nature, and the circumstances and environment in which he is placed, and they tell us that man is by nature a social animal and must live in society, and that society is not possible unless we can have order and peace.

Now where there is anything desirable to man, wherever there is an object of human desire of which the supply is limited, where there is not enough for all, there will necessarily be struggles and contentions for the possession of it, and if there were nothing to prevent it, those who had the most power would engross the most valuable things of the world. There would be constant warfare for the possession of desirable things where there was not enough for all, unless there was some rule and some means by which that warfare should be prevented.

Now therefore property at once becomes a necessity in order that there may exist peace and order in human society, and we say therefore that the foundation of property, its first and original foundation, was in necessity — the necessity of peace and order. That necessity, of course, must be carried to this extent, that every object the desire and supply of which must be limited, must be owned by somebody. When you have that state of things, you have peace, and until that state of things is established, you cannot have peace. Therefore we find that everywhere the first thing which men do when they form themselves into human societies is to assign a determinate owner to every object of human desire, the supply of which is limited. Those views are well expressed in the early part of Blackstone's Commentaries on the Laws of England ; and he has a very elegant chapter to which I would refer the particular attention of the members of the Tribunal.

I shall read an extract only from it here. He says : (**U. S. A. p. 54.**)

> Again, there are other things in which a permanent property may subsist, not only as to the temporary use, but also the solid substance, and which yet would frequently be found without a proprietor had not the wisdom of the law provided a remedy to obviate this inconvenience. Such are forests and other waste grounds, which were omitted to be appropriated in the general distribution of lands. Such also are wrecks, estrays, and that species of wild animals which the arbitrary constitutions of positive law have distinguished from the rest by the well known appellation of game. With regard to these and some others, as disturbances and quarrels would frequently arise among individuals, contending about the acquisition of this species of property by first occupancy, the law has therefore wisely cut up the root of dissension by vesting the things themselves in the Sovereign of the State, or else in his representatives appointed and authorised by him, being usually the lords of manors. And thus the legislature of England has universally promoted the grand ends of civil society, the peace and security of individuals, by steadily pursuing *that wise and orderly maxim of assigning to everything capable of ownership a legal and determinate owner.*

Then Sir Henry Maine has also made an allusion to this doctrine which is well worthy of attention, and he speaks of it, — this principle of assigning a determinate owner to everything capable of ownership, not simply as an original feature in human society, but one which, from the long habitudes of society, comes to be regarded as essential by everyone. He says :

> It is only when the rights of property gained a sanction from long practical inviolability, and when the vast majority of objects of enjoyment have been subjected to private ownership, that mere possession is allowed to invest the first

possessor with dominion over commodities in which no prior proprietorship has been asserted. The sentiment in which this doctrine originated is absolutely irreconcilable with that infrequency and uncèrtainty of proprietary rights which distinguish the beginning of civilization. The true basis seems to be not an instinctive bias towards the institution of property, but a presumption, arising out of the long continuance of that institution, that *everything ought to have an owner*. When possession is taken of a *res nullius*, that is, of an object which is not, or has never, been reduced to dominion, the possessor is permitted to become proprietor from a feeling that all valuable things are naturally subjects of an exclusive enjoyment, and that in the given case there is no one to invest with the rights of property except the occupant. The occupant, in short, becomes the owner, because all things are presumed to be somebody's property, and because no one can be pointed out as having a better right than he to the proprietorship of this particular thing.

And Lord Chanceller Chelmsford made use of the same doctrine in rendering the decision of the House of Lords in a case, doubtless very familiar to my learned friends on the other side, of *Blades* v. *Higgs*. That was a case where a trespasser entered the grounds of another, where he had no right, and killed some game there; and the question was to whom the game belonged, — whether to the trespasser or to the owner of the property. The judgment of Lord Chancellor Chelmsford proceeded along this line. He says everything that is capable of ownership must be owned by somebody; and, therefore, in this case this dead game must be owned either by the man who killed it the trespasser, or by the man upon whose ground it was killed. He said it cannot be the property of a trespasser, because a man cannot be permitted to work out for himself an advantage from the committal of a wrong; and, therefore, it must be the property of the owner of the soil; and that was the conclusion of the Court, though it is quite contrary to what the doctrine of the civil law would be. However, I cite this for this purpose, that the necessity of society requires and always has required that everything should have a determinate owner, — that is a proposition which is everywhere received; and even so far received as to be made the foundation of this judgment.

[The Tribunal then adjourned for a short time.]

Mr Carter. — In the enquiry as to the origin of the institution of property I had reached the conclusion that the original basis of it was the necessity of peace and order, which is, of course, an absolute requisite of human society, and therefore the institution of property is coeval with the existence of human society upon the earth. That stands upon the immutable basis of necessity, and to employ the language of Blackstone I may say: "Necessity begat property", and the extent of the institution is this — and the extent to which the necessity of which I speak requires to be carried is, that everything capable of being owned must be assigned to some legal and determinate owner. When that is done, peace is secured. Without that being done there is strife and warfare in society, and society can no longer exist.

Now there are three conditions necessary in order that property may subsist in anything; that is, upon the view which I have supposed myself to establish. A thing, in order to be the subject of property must been object of human desire; that is to say, it must have recognized utility. Property cannot exist in noxious animals such as reptiles — nothing that is not an object of human desire can be the subject of property, because there can be no contention with reference to it. Nobody wants it, and what nobody wants is, of course, nota subject of property.

In the next place, the thing must be limited in supply, that is, that there must not be enough for all. It must be exhaustible in its nature; therefore there can be no property in air and the light of the sun, in running water, or in things of that sort. They exist to an infinite extent, and there is abundant to satisfy the wants of every one; and, of course, there can be no struggle or contention there. There is enough for all and abundance.

In the next place, it must be susceptible of exclusive appropriation, and there are things which are not thus susceptible, though they may be useful, and though the supply of them may be limited. Take wild birds, such as game, for instance. There is no question as to their utility. The supply is often extremely limited. There is not enough for all, but they cannot be made the subject of exclusive appropriation. No man can take them and hold them : they never submit themselves to human control. Human law cannot stamp them as being the property of one man, bring them within his control.

These three conditions, therefore, are essential as to property — first, that the subject of it should be useful; second, that it should be limited in supply, and third, that it should be capable of exclusive appropriation.

These are the deductions of reasoning from the admitted facts of man's nature and from the circumstances in which he is placed; but they will be found at once confirmed upon an appeal to experience. We cannot now find; we never could find in any stage of human society, anything embracing these things, three conditions of which I have spoken, — utility, exhaustibility and capacity of exclusive appropriation which was not by the law assigned as the determinate property of some individual or corporation.

Now, this is true of property as between individuals. It is, in the same manner, true of property as between nations; for the same necessity of peace and order exists in the larger society of nations as in the smaller municipal societies of the world. The larger society of nations cannot exist in comfort, unless there shall be the means of putting some cessation to strife; and if there is a contention among the nations of the earth and no rule provided for the settling of such contentions, why, they would be continually at war; and, consequently, we find that, in respect to such things as are not suitable for individual appropriation, but are suitable for national appropriation, the same rule applies. If they are

objects of desire, if the supply is limited, and if they are capable of exclusive appropriation, they must be owned by somebody.

Now, that principle in respect to nations finds its main illustration in newly discovered countries of the world. When the New World was revealed to the Old, there were vast tracts of the Earth's surface the object of contending ambitions ; and there would have been perpetual war unless there was some rule by which international strife could be prevented, and that rule was the adoption of this very principle of property which I contend for, — that everything must be owned by somebody ; and there we find the efficacy of the title of first discovery. The rule was early established that the nation that first discovered any new region of the earth should be regarded as having a fixed and perfect title to it ; and why should that be ?

Why should the mere circumstance that the citizen of one nation had coasted along the coasts of a Continent give him the power or the nation the power, by assuning the benefit of is discovery, to declare that to be its own ? Why, of course it was because the nations of the world felt the necessity of some rule which would prevent strife among them ; and, therefore, the least circumstance tending to give a superior moral right to one over another was recognised as a just foundation for property. They said : There is nothing else to give a title, and, therefore, it shall be awarded according to the first discoverer.

The President. — Where do you find the rule that the mere fact of first discovery of land gives a right of sovereignty to the nation that first discovered the land ? I will remind you that that is not the law that now stands with regard to Africa. A few years ago, there was held in Berlin a Conference which decided positively that discovery in itself would create no title unless it was followed by occupation, and not only by occupation but the notification of that occupation to other Nations.

Mr Carter. — Well, I think Mr President, upon reflection you will find that that doctrins does not vary from the one which I am endeavouring to state. If a Nation has discovered a new region of the earth and has abandoned all intention of occupying it, it definitely ceases to have a property in it ; and the intention of abandonment is evidenced by the fact that it does not follow up its discovery by occupation. The failure to occupy after the lapse of a very considerable time would be deemed sufficient evidence that it had lost its title by abandonment. Nevertheless, its original title of discovery was good. It was necessary indeed to hold it permanently, though it should be followed by occupation ; but it was not necessary to the acquisition of it.

The President. — Pratically, the consequence is the same.

Mr Carter. — The consequence is the same ; and I fully agree to the apparent modification which is suggested by the learned President, but it constitutes no real modification of the doctrine. For authority upon the point which I have just stated in reference to nations, it will be found stated by the writers upon the law of nature and of nations ; but it is

also very clearly put by Chief Justice Marshall, a Chief Justice of the Supreme Court of the United States, in delivering the Judgment of that Court in the very noted case, at least in America, of *Johnson* v. *Macintosh* which is contained in a note to page 56 of my Argument.

I will read from that description :

> As the right of Society to prescribe those rules by which property may be acquired and preserved is not, and cannot be, drawn into question ; as the title to lands, especially, is, and must be admitted, to depend entirely on the law of the nation in which they lie, it will be necessary, in pursuing this inquiry, to examine, not simply those principles of abstract justice which the Creator of all things has impressed on the mind of his creature, man, and which are admitted to regulate in a great degree the rights of civilized nations, whose perfect independence has been acknowledged, but those principles also which our own Government has adopted in the particular case, and given as the rule of decision.
>
> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent afforded an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing upon them civilization and Christianity, in exchange for unlimited independence. But as they were all in pursuit of nearly the same object, it was necessary in order to avoid conflicting settlements, and consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was that discovery gave title to the governments by whose subjects, or by whose authority it was made, against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives and establisling settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which by others all assented.

It is founded, therefore, upon the right of discovery, it is that which gives the title, although a failure to occupy may be evidence of abandonment undoubtedly.

There is another circumstance which I shall allude to as having a tendency to support the same line of argument which I am following. It will be remembered that at this period when the riches of the new world were thus revealed, there was a danger of so much strife that one of the Popes — Pope Alexander VI, I believe — made a grant to Spain of all undiscovered regions in the globe west of the 100th meridian of longitude, He affected to make a grant of that even without discovery.

Perhaps we should not, in these days recognise such a title, but it will be remembered that in those the authority of that power was held somewhat more highly than it is now.

The President. — I would suggest you mean " more universally " not " more highly ".

Mr Carter. — Yes more universally. And who will say that when the object is to find a rule by which strife and warfare shall be prevent-

ed among men, the acquisition of a title like that would be insignificant ? No : it would be respected by a great many, and it is not so absolutely unfounded and preposterous as many at the present day might think it to be. It had a weight and an importance at that time which we cannot very well appreciate now. But all these things go to show the necessity of the institution of property for the purpose of preventing strife among men, and that necessity goes to this — that we must find an owner for everything. That is the point of all that I am speaking to now. So much in reference to the first ground and reason upon which the institution of property stands among men. It is complete in itself, because it is the fruit of a social necessity. But so far as the mere prevention of strife among men is concerned, it is not necessary that private individual property should exist the institution property would be all that would be necessary.

But there are two forms of the institution of property. One is community property, and the other private individual property ; and the signal necessity of the prevention of warfare and strife, would be satisfied by the institution of community property; and accordingly we find that in the earlier period of society, under rude social conditions, private individual property did not exist, but community property. The tribe — the gens — owned all the property, and there was substantially no individual property at all. Whence, then, is it that we derive that other form of property which is known as private individual property? From what does that come? It does not proceed on the grounds of the same necessity — namely, the prevention of strife and warfare among men. It comes from another circumstance, to which I will now call the attention of the tribunal — that is, the progress of civilization ; and that is founded upon another fact of man's nature that is that he has a desire to better his condition. He has a desire to enjoy more of the good things of life; he has a desire to establish a family, and to increase the numbers of those who are dependent upon him. His ambitions, his aspirations, for more and more are continually stretching out; and it is upon those tendencies that the civilization of the earth is founded. It brings along with it simultaneously (as being distinct incidents), in the first place, fixed habitations instead of a wandering life. In the next place a multiplication of the population of the earth. In the next place increased wants; division of employments ; the exchange of products — which is commerce — and the introduction of the use of money. All those elements are features of civilization.

They make their appearance simultaneously, and gradually, and by degrees, they change the face of the earth, and they are, as I shall submit to you, the foundation not of the institution of property itself, but of that form of it which we understand by private individual property. The principal one of those features which constitute the foundation of private property, and makes private property necessary, is the increase in the population of the earth, and it is to the effect of that circumstance that I shall have to invoke your attention. Under barbaric conditions when

men are living in a wild state, they live upon the spontaneous fruits of the earth, and upon such animals as they can obtain by hunting. They cultivate nothing. The earth under such conditions as that, affords a support but for a sparse population. No extended population can be supported under those conditions; but as civilization begins and makes its advances, increasing numbers make their appearance upon the earth, and those increasing numbers must be fed ; and the necessity of feeding those increasing numbers requires a very different disposition of things. The necessity at once arises for cultivating the earth, and for cultivating all the bounties of nature, and making them sufficiently productive to supply the increasing wants of an increasing population. Labour, therefore, becomes at once necessary, and how are you going to induce men to labour? Society cannot compel them; that is not a practicable method.

The way which is adopted of inducing men to labour is to promise them as a reward for their labour the fruits of their labour. It is an appeal to the imperious and everywhere present motive of self interest. No man will cultivate fields — no man will sow — if another can reap. No man will undertake to tame animals of the earth and increase their numbers if the increasing numbers can be taken at liberty by any one who will : labour cannot be brought into activity; men cannot be brought to exert their natural powers unless you promise them, and secure to them, the product of the exercise of those powers as the reward of their labour. It is there where the institution of property begins; and it is the necessity of supplying the wants of the increasing number which civilization brings along with it, which brings that form of property which we know as private individual property into existence.

It is now that the land becomes to be cultivated, and society says to man : " If you will cultivate this land you shall have the products of the field. " It says to him also. " Here are races of animals : If you will tame them, if you will increase their numbers, you shall have the increasing numbers for yourself. " Society says also, in reference to all articles of manufacture : " If you will make these agricultural tools, if you will make these instruments, if you will make this furniture, it shall be yours "; in other words, society says to its members everywhere; " The products of your art, your industry, and your labour, shall belong to you. " Therefore, we have, with the increasing numbers which civilization brings with it, and in obedience to another social necessity, equally imperious with that of preserving the peace of the world, the development of the institution of property, and the change of it from the form of community property into that of private individual property.

Now I have said all I design to say for the purpose of showing how property, whether it is in the form of community property, or in the form of private individual property as it is ordained. I wish now to say something in respect to the extent of the dominion over things, which is implied by the term " property ". In the first place, let me say that it

is not an absolute dominion. No man, and no nation, has under the law of nature — under the moral law, or in any view consistent with the moral order of the world an absolute property in any thing; he has only the right to use it. It is at all times coupled with a trust for the benefit of mankind. There is no absolute right in any man to anything on the face of the earth. The earth, and all its bounties, were originally the gift of Almighty God to mankind in general — not to *this* nation, not to *that* nation, but to all men equally and alike; and that title — that beneficial title — which has been given to all men alike, has not been displaced by the establishment of individual property.

The custody of the thing is indeed given to individuals or to particular nations; but it is accompanied at all times with a trust for the benefit of mankind for whom it was originally designed, and for whom nature still continues to design it.

Now, how is that trust worked out? How is it that men all over the earth can enjoy this beneficial interest, which nature originally intended that they should have, in all the productions of the earth?

Why, it is through the instrumentality of commerce, which is another of the results of civilization. It is by means of the exchanges of products between different regions of the earth, and between different peoples, that all are enabled to enjoy for themselves this beneficial interest in everything on the face of the earth which was originally designed by Providence. They could not enjoy all this except through the instrumentality of individual property, or of national property and the instrumentality, also, of commerce.

Take these seals, for instance, about which we are talking. They were intended and designed for the benefit of mankind, — of mankind in Europe, as well as for the people in the immediate vicinity of these islands where they have their home. But how were they used before commerce existed? Why, so far as they were used at all, they were applied to the uses only of the few hundreds or the few thousands of Indians who lived along that coast. No other of the people of the world participated in the benefits from them, or could participate in the benefits from them — there were no means by which they could get at them. But the moment commerce is established among men, then the products of these herds is furnished to commerce, and, through the instrumentality of commerce, goes all over the world; so that seals, and the product of the seals, — sealskins — eventually find their way to the very persons who want them, wherever they dwell. In that way, the original gift made by God to all mankind is fully and effectively worked out, although the custody and the possession of the thing is given to some particular nation, or to some particular men.

And how perfectly this operates, will be seen when we consider that the seals, even to the people who were capable of gathering their skins — (I mean those tribes of Indians on the coast) — had no utility even to them except for the purpose of supplyng their immediate wants; and a

few hundreds or a few thousands of the seals at most were sufficient for such purpose.

The rest of the products of this bounty of Providence went unimproved, and went unimproved because there were no means by which the benefits of it could be carried to other parts of the world, to those persons who might enjoy them. But when commerce was instituted, the case was quite different.

Then the inhabitant of Europe who has to have a seal skin has to furnish some of the products of his own labour to those who gather the seals, and to thereby obtain his proportion of the seals. In other words the giving of these seals to commerce, or the product of these seals to commerce, is tantamount to putting them up to auction before all mankind. The highest bidder gets them and the man who wants them, if he happens to live in Europe, gets them on the same terms as the man who lives in the United States; and thus this bounty, originally intended by Providence for the benefit of all mankind, is really applied to the benefit of all mankind — it is applied to the benefit of so much of mankind who want them. With regard to those who do not want them of course they are not designated for them; they are designated forthose who do want them.

This truth will be seen to be further illustrated — (that the products of nature are given to all mankind) — if we inquire who would be the losers on taking away a blessing? For instance, suppose seals were to be destroyed, upon whom would the loss fall? You might say the loss would fall upon those who gather them and make a profit on them — their industry. But that would only be a temporary loss — they then could go into other forms of industry and support themselves as well. So also there are persons engaged in the manufacture of them in Great Britain— a very large number of persons — and a temporary loss might fall upon them in depriving them of that particular employment; but there are plenty of other employments in which they could employ their labour and the loss would be but temporary. But when you come to the person who wants the seal skin for its intrinsic quality, his loss is irreparable and cannot be supplied.

Now I have said that the title, whether of nations or of men, to particular things is not absolute, but coupled with a trust for the benefit of mankind. So far as any man or any nation has more of a particular thing than is necessary for his own purpose, he is bound to let others have it. He holds it upon that trust; and we shall see that the law of nature perfectly recognizes that trust, for it declares that commerce is obligatory. Commerce by the law of nature, and nations, is obligatory. No nation has the right, without sufficient cause, to withdraw itself from commercial communication with the world, and say to other people, and to other nations, that it will not afford to them its own blessing and its own bounties. I will read from what has been written on the subject. I will read from a note on page 61 of my argument, a passage from a work on

the Rights and Duties of neutral nations in time of war by a French writer Hautefeuille. He says.

The Sovereign Master of nature did not confine himself to giving a particular disposition to every man; he also diversified climates and the nature of soils. To each country, to each region, he assigned different fruits and special productions all or nearly all of which were susceptible of being used by man and of satisfying his wants or his pleasures. Almost all regions doubtless produced what was indispensable for the sustenance of their inhabitantes, but not one produced all the fruits that were necessary to meet all real needs, or more particulary all conventional needs. It was therefore necessary to have recourse to other nations and to extend commerce.

Man, impelled by that instinct which leads him to seek perfection created new needs for himself as he made new discoveries. He accustomed himself to the use of all the productions of the earth and of his industry. The cotton, sugar, coffee, and tobacco of the new world have become articles of prime necessity for the European and an immense trade is carried on in them. The American, in turn, can not dispense with the varied productions of European manufacture. The development of Commerce, that is to say the satisfaction of man's instincts of sociability and perfectibility, has greatly contributed to connecting all the nations of the universe; it has served as a vehicle, so to speak, for the performance of the duties of humanity. Commerce is really, therefore an institution of primitive law; it has its source and its origin in the divine law itself.

I will also read a passage from Vattel on the same subject. He says :

All men ought to find on earth the things they stand inneed of. In the primitive state of communion they took them wherever they happened to meet with them if another had not before appropriated them to his own use. The introduction of dominion and property could not deprive men of so essential a right and consequently, it can not take place without leaving them, in general, some means of procuring what is useful or necessary to them. This means commerce; by it every man may still supply his wants. Things being now become property there is no obtaining them without the owner's consent nor are they usually to be had for nothing but they may be bought or exchanged for other things of equal value. Men are therefore under an obligation to carry on that commerce with each other if they wish not to deviate from the views of nature, and this obligation extends also to whole nations or states.

And I might greatly multiply these writers. I will read next an extract from the bottom of the same page, from a French writer, Felice, in his Lectures on the Law of Nature and Nations :

The need of this exchange is based upon the laws of nature, and upon the wise arrangment which the Supreme Being has established in the world, each region and each portion of which furnishes, indeed, a great variety of productions, but also lacks certain things required for the comfort or the needs of man; this obliges men to exchange their commodities with each other, and to form bonds of friendship, whereas, otherwise, their passions would impel them to hate and destroy each other.

The law of commerce is, therefore, based upon the obligation under which nations are to assist each other mutually, and to contribute, as far as lies in their power, to the happiness of each other.

That is applying a proposition of the distinguished writer, Montesquieu, who makes it one of the duties of nations that they should support and assist each other, so far as it may be in their power, a prin-

ciple which has been everywhere recognized and adopted by juridical writers.

I will next read a passage from Levi, which is to be found at page 63.

> Commerce is a law of nature and the right of trading is a natural right; but it is only an imperfect right, inasmuch as each nation is the sole judge of what is advantageous or disadvantageous to itself; and whether or not it be convenient for her to cultivate any branch of trade, or to open trading intercourse with any one country. Hence it is that no nation has a right to compel another nation to enter into trading intercourse with herself, or to pass laws for the benefit of trading and traders. Yet, the refusal of this natural right, whether as against one nation only, or as against all nations, would constitute an offence against international law; and it was this refusal to trade, and the exclusion of British traders from her cities and towns, that led to the war with China.

referring to the war between Great Britain and China. Let me put, as illustrating this proposition, that no nation has an absolute property in any of the gifts of Providence, which happen to fall into its possession, but that, it is under a trust to communicate them to others, to far as it may, consistently with its own necessities.

Let me suppose the case of an article like India rubber, for instance. It has become, we might say, a prime necessity to the human race all over the world. It is produced but in very few places. It is supposable that the nation which has dominion over those places might, for its own purposes, seek to exclude the commerce of the world from it. It might even go so far as to attempt to destroy the plantations which produce the tree from which the gum is extracted. Let it be supposed that the nation which happens to have supreme dominion over those territories should undertake to resort to a step so extreme as that. Would it give any rights to other nations? Most certainly it would. It would give a right to other nations to interfere, and to take possession, if necessary, of the region in which that article, so important, so necessary to mankind, was alone grown, in order that they could supply themselves; and the ground of it would be that the nation to whom the custody of that blessing had been entrusted, refused to perform the trust which was imposed upon it in relation to it, to share that blessing with the rest of mankind.

The President. — Do you mean a legal right?

Mr Carter. — A legal right — I mean that.

The President. — Without considerations.

Mr Carter. — I mean a perfect legal right. Let me carry that a little further, should there be any doubt about it. In international law we have a whole chapter in regard to the instances in which one nation may justly interfere in the affairs of another; and there are numerous instances in history in which such interference has been had. Take one of the most common of them, as to which Europe is undoubtedly familiar, and that is the steps to preserve the balance of power. When one nation in Europe has seized another — so extended its own territory or otherwise, as to threaten what it deems the balance of power in European States — it has from the earliest period in recent European history been

deemed as a cause for interference, and, if necessary, for war; and that interference is defended upon moral grounds, and is perfectly defensible upon moral grounds; for what right has one nation to threaten the peace of the world?

The President. — It is one of the forms of self-defence.

Mr Carter. — It is one of the forms of self-defence; that is to say that every nation has a right to take such steps as are necessary to defend it in the enjoyment of its own just rights. Now, as I said before, and as has been stated by a multitude of writers, the bounties of nature were originally given to all mankind — all mankind have a right to participate in them. The coffee of Central America and Arabia is not the property of those two nations alone. The tea of China is not the property of that nation alone. The rubber of South America is not the property of that nation alone where it is grown — they are the common property, the beneficial property, of mankind; and if the nations which happen to have the custody of them withdraw them from the benefit of mankind, they are failing in one of their natural obligations; and other nations have a right to interfere and secure themselves in the possession of those rights which they are entitled to by the law of nature.

Lord Hannen. — Might the nations that are in possession of those particular things sell them at their own price?

Mr Carter. —Yes, they might sell them at their own price.

Lord Hannen. — And that, although it may he a very high price?

Mr Carter. — And that, although it may he a very high price, until you come to such a point where they put a price upon them which amounts to a intentional refusal. Wherever you can bring them to the point that they are violating the trust they are under — violating the duty which they owe to mankind — attempting to arrogate to themselves the exclusive benefit of a blessing which was intended for all — when they reach that point, then you can interfere. Until that, they can exercise their own discretion. I do not dispute the right of a nation to say: " For certain reasonable purposes we must interdict commerce with such a nation ". That is a right; and occasions might arise when that may depend on reasonable grounds, for it. There may be grounds, or reasons, whereby a nation may say: " We think fit, for a limited period and under certain conditions to refuse all foreign commerce ". There may be exceptional circumstances under which that is permissible; but what I do assert is, that where a nation says: " We will, for ever, preclude the world from participating in those benefits of Providence to which we assign to them the sole possession "— whenever they say that, they commit a violation, of natural law — a violation, as I think, universally admitted of national law, which gives other nations a right to interpose and assert for themselves those benefits and blessings to which they are entitled under the law of nature.

And the practice of mankind has universally proceeded upon that principle — let me assert that the practice of mankind has universally proceed-

ed upon that principle. Upon what ground can we defend the seizures by the European powers of the territories of the new world — the great continents of North and South America? England, France, Spain — nearly all the European countries engaged in the enterprises of taking possession of enormous tracts and territories of the new world from the nations which occuped them. They never asked their permission; they took them forcibly and against their will. They said to those uncivilized nations : " These things are not yours — they are ours, and we choose to treat them as such ".

That policy has been pursued by the civilized and Christian nations of Europe for centuries, and up to this day. Is it robbery, or is it defensible upon some ground or other? It is *one* of those things. I assert that it is not robbery, but that it is defensible. Why is it? It is because those barbarous and uncivilized nations did not turn the blessings of Providence of which they were the custodians to those purposes for which Nature, and Nature's God intended them. They were not faithful to the trust which was imposed upon them as possessors of those blessings — they were incapable of discharging to mankind the duties which the possessions of such blessings ought to demand from them. The nations of Europe said : " Those vast tracts of the most fertile parts of the earth, capable of sustaining vast populations, capable of maintaining a commerce with distant nations, capable of benefiting all mankind, *was* not to be allowed to remain a waste and desolation ".

It was not for such purposes that the earth was given to men, and that constitutes the title of civilized men everywhere to take out of the possession of barbaric man whatever he has which can contribute to the civilization, the comfort and the well-being of mankind.

Senator Morgan. — Are you aware, Mr Carter, that at recent conferences at Brussels and Berlin, in respect of Central Africa, they adopted that particular principle?

Mr Carter. — I cannot say, because I am ignorant whether it was based upon those principles or not; but certain I am that the whole practice of mankind from an early period of history has been based upon the principles for which I am contending, and certain I am that, unless those principles are well founded, the whole course of European occupation of and settlement in the New World is indefensible robbery. What is going on? — What did England do in the case of China, for instance, in 1840? Made war upon China and subdued her. Why? Well, the real cause of war is not always correctly stated in the pretexts which are given for it, and in that particular instance the pretext on the part of Great Britain was well, some discourtesy that had been shown to individuals, some mal-treatment of British officials — something of that sort.

If we look into the history of things, it will be found that war commenced when China had closed her ports, and that it terminated in a treaty by which she bound herself for ever to keep them open. That shows us what the cause was, and it was defensible too. I do not put it as

an outrage on the part of Great Britain at all, until the occasion for the interference should be grave; but whenever a nation refuses to perform that clear and manifest trust imposed upon it in respect of those blessings and gifts of Providence which are confided to them, then there is a cause for the intervention of other nations.

Take the case of Peruvian Bark for instance — that which is commonly regarded as a medicine, as a remedy, as absolutely necessary in the economy of States. That is a necessity for the cure of certain diseases — it is a specific for them. They will rage unrestrained unless you have Peruvian bark. It is grown in but a few places. Suppose the countries where it was grown should say, we wont compel the rest of the world to terms, but we choose for some reason or other not to engage in commerce; not only that, but we are going to destroy this Peruvian bark.

We are going to devastate the plantations where it is cultivated. Is mankind going to permit that? Certainly not.

Among the cases which from time to time have been deemed sufficient for one nation to interfere with the affairs of another, why that outweighs them in clearness and magnitude by far. There is a recent instance which we read about every day in the newspapers. Why is Great Britain in Egypt maintaining a control over the destinies of that region? What ground has she for asserting a dominion over these poor Egyptians. Weak and feeble they are indeed and incapable of resistance. Is that the only defence? No : I fancy those who are in charge of the defence of the interests of Great Britain can make out a better case for her than that. It is because Egypt is the pathway to a mighty commerce; it is because it is necessary that that commerce should be free and unrestrained. That great avenue of the world's traffic must be made to yield its benefit to mankind; and if the Government of Egypt is not capable of making it thus yield its utmost benefit, if she is incapable in other words of performing her trust, other nations have a right to interfere and see that the trust is performed.

The President. — Mr Carter you are taking a very high point of view, because you seem to me to anticipate, in some measure, the judgment of history. I will not say more to-day.

Mr Carter. — I am taking no higher point of view than the view taken by the practice of mankind for 300 years. I am only asserting those rights which nations have asserted for 300 years. If that is a high point of view, I am taking it, but it is a view which is defensible upon theory, and defensible upon practice.

There is one point of view in which it is not defensible. Will any one maintain that where a particular tract of the earth abounds in a blessing, sufficient to afford comfort and convenience to a very large part of mankind that that nation may, if she chooses, wholly divert that blessing from the bounties which it is capable of conferring? Will any one assert that? If that is true, then all that which the writers upon the law of Nature tell us to the effect that gifts of Providence were made by Providence

not to this nation on to that nation, but to mankind in general, is erroneous. Is it so?

Are those doctrines erroneous? Why I must appeal to some of them. Let me refer to Vattel.

Sir Charles Russell. — What page is this on?

Mr Carter. — This is on a separate paper that I have, but with which to morrow I stall be able to furnish you.

Sir Charles Russell. — Would you Kindly tell me the chapter?

Mr Carter. — It is Vattel, 7th American edition, 1849, Chapter 18, Section 203, page 98.

Hitherto we have considered the nation merely with respect to itself, without any regard to the country which it possesses. Let us now see it established in a country which becomes its own property and habitation. The earth belongs to mankind in general; destined by the Creator to be their common habitation, and to supply them with food, they all possess a natural right to inhabit it, and to derive from it whatever is necessary for their subsistence and suitable to their wants.

I will next read an extract from Dr Bowyer's Commentaries on the Constitutional Law of England, page 127.

The institution of property, that is to say, the appropriation to particular persons and uses of things which were given by God to all mankind is of natural law.

And I suppose that when God gave things to all mankind he did not intend to give to particular men any right to appropriate them exclusively to themselves.

I will next read a passage from John Lockes in Treatises on civil Government, Book II, chapter 5, section 26.

God who hath given the world to men in common hath also given them reason to make use of it to the best àdvantage of life and convenience. The earth and all that is therein is given to men for the support and comfort of their being and though all the fruits it naturally produces, and beasts it feeds belong to mankind in common, as they are produced by the spontaneous hand of nature; and nobody has originally a private dominion exclusive of the rest of mankind in any of them, as they are thus in their natural state, yet being given for the use of men, there must of necessity be a means to appropriate them some way or other before they can be of any use, or at all beneficial to any particular man.

I will next read a passage from Sergeant Stephen's New Commentaries on the Laws of England, Volume 1, Book II, pages 159-165.

In the beginning of the world, as we are informed by Holy Writ, the all Bountiful Creator gave to man dominion over all the earth, and over the fish of the sea, and over the fowls of the air, and over every living thing that moveth upon the earth!

Hence the earth, and all things therein are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creater.

I will next read a passage from Vattel, 7th American edition, Book 2, Chapter 2, Section 2.

All men ought to find on earth the things they stand in need of. In the primitive state of communion they took them wherever they happened to meet with

them, if another had not before appropriated them to his own use. The introduction of dominion and property could not deprive men of so essential a right; and, consequently it cannot take place without leaving them in general some means of procuring what is useful or necessary to them. This means commerce; by it every man may still supply his wants. Things being now become property, there is no obtaining them without the owner's consent, nor are they usually to be had for nothing; but they may be bought or exchanged for other things of equal value. *Men are, therefore under an obligation* to carry on that commerce with each other, if they wish not *to deviate from the views of nature*; and this obligation extends also to *whole nations or* states.

International law is filled with statements of these general doctrines — that the earth was given to all mankind for their common benefit, and that it must be so appropriated as to enable them to enjoy that common benefit : that commerce is the means by which that common benefit can be extended to all nations, and, therefore, the carrying on of commerce as an obligation rests upon all nations. Now when we speak of an obligation resting upon nations — when it is spoken of by almost every writer who has dealt with the question, they are not dealing with mere empty words. These things are not mentioned by them as meaning nothing. They mean what they say. They mean that this is an obligation, and that this is an obligation which in suitable cases can be enforced.

So much for the first limitation which I have stated property was subject to. Whether held by nations or by individuals, it is held subject to a trust for the benefit of the world, as to so much of it as is not needed for the purposes of the particular owner, by that owner — a nation or mankind the benefit of it must be extended on just terms to those for whose benefit it was designed.

I now have to state a second limitation upon property, whether it be held by nations or by men, and that is that things themselves are not given, but only the use of them; that is all. The world was given to be used, and only to be used not to be destroyed.

Men bring into the world their children, those who are to follow them; they are under an obligation to leave the means to support them. Is it necessary for me to argue that no man has so absolute a property in anything that he can be permitted to destroy it? Surely I ought not to be required to !

The President. — " *Uti et abuti* " say the Romans.

Mr Carter. — Yes, there are two things " *uti* " and " *abusi* ". It is given to us to " use ", not to " abuse " or " destroy. " We have no title to do that. Property is sometimes said to be in municipal law, and when no great question is concerned, property in an individual is generally regarded as absolute. If a man choose to throw away a bushel of wheat, there is nobody to call him to account, and the State does not call him to account; it does not do that, because the probability that such a thing will be done is extremely remote; we can safely rely upon the selfish element in human nature to prevent any such thing being done. But suppose it was a common thing and likely to occur would the laws be

silent about it then? By no means. I think I have some citations upon that very point and I will read from a writer of admitted authority, and that is Ahrens : —

> The definitions of the right of property given by positive laws generally concede to the owner the power to dispose of his object in an almost absolute manner to use and abuse it, and even through caprice to destroy it; but this arbitrary power is not in keeping with natural law; and positive legislation obedient to the voice of common sense and reason in the interest of society has been obliged itself to establish numerous restrictions, which examined from a philosophic view of law, are the result of rational principles to which the right of property and its exercise are subjected.
>
> The principles which govern socially the right of property relate to substance and to form.
>
> As to substance, the following rules may be established : —
>
> I) *Property exists for a rational purpose and for a rational usage*; it is destined to satisfy the various needs of human life; consequently, *all arbitrary abuse, all arbitrary destruction are contrary to right* (*droit*) and should he prohibited by law (*loi*). But to avoid giving a false extension to this principle, it is important to recall to mind that, according to personal rights, that which is committed within the sphere of private life and of that of the family does not come under the application of public law. It is necessary, therefore, that the abuse be public in order that the law may reach it. It belongs to the legislations regulating the various kinds of agricultural, industrial, and commercial property, as well as to penal legislation, to determine the abuses which it is important to protect; and, in reality legislation as well as police laws, have always specified a certain number of cases of abuses. Besides, all abusive usage is hurtful to society because it is for the public interest that the object should give the owner the advantages of the services of which it admits.

The other refers to the occasion of a debate upon the adoption of the French Civil Code, and, in respect to article 544, which defined property, Napoleon expressed energetically the necessity for suppressing this abuse.

> The abuse of property, should be suppressed every time it becomes hurtful to society, Thus, it is not allowed to cut down unripe grain, to pull up famous grape-vines. I would not suffer that an individual should smite with sterility 20 leagues of ground in a grain-bearing department, in order to make for himselt a park thereof. The right of abuse does not extend so far as to deprive a people of its sustenance.

And the Roman Law says : *Expedit enim reipublicæ ne sua re quis male utatur.*

All this supports the view which I am endeavouring to present to the Tribunal; the definition of property does concede formally to the individual a right to abuse it, a right to destroy it; it concedes the " power. " I will not, say it concedes the " right " for it does not concede the right; on the contrary legislation in a thousand forms is made against any destruction of property, and wherever a destruction is threatened, or where there is any considerable probability that an individual would abuse a property the law would step in to suppress it. The law of nature, the philosophy upon which all law is founded must necessarily preserve the institution of property, and apply, wherever it may be needed, such remedies as may be necessary to prevent any destruction of it.

Let me call to mind in how many ways our municipal law exerts its efforts in that direction. We impose taxes for the purpose of sustaining bodies of men who shall make scientific enquiries by which agriculture may be encouraged, and the productions of the earth increased, shewing the regard that society has not only to prevent the destruction of property, but to increase it. We re-stock the rivers, — we even attempt to re-stock the seas and expend a great deal of money in those respects. These are efforts going further than the mere effort to preserve property, they are efforts to increase it, and are efforts indeed to preserve the sources of blessings which are in course of extinction.

See how even the use of private property is interfered with. Take an individual who it may be is a lunatic, or idiot, or drunkard, or aspendthrift having a large property, does society allow that individual to deal with that property as he likes? No, then say he is likely to destroy it, or he will abuse it, or he will not handle it well and they take it out of his possession and put it in the hands of a trustee. Why? Is it out of consideration or tenderness for the feelings of such a worthless wretch as he? It is for the preservation of society and for the preservation of that property for the use of society generally, or the individual to whom it might ultimately go.

This individual might himself have no heirs, and the State might be the next person to come in and take possession of it by escheat; would that alter the action of society with respect to it? No they would take it out of his hands just as quickly.

Take a familiar doctrine in the Law of Admiralty. Here is a vessel at sea. She meets with disaster; she has been dismantled, and is lying helpless upon the bosom of the sea. Another vessel comes there in perfect condition, well rigged, and able to take her into some port in safety. This vessel, newly arriving, offers the captain on board of this stricken vessel to take him into port for a reasonable salvage; and he says : —

No, I will find my own way in there. I think I can get there. Well, the salvor says, I do not think you can get there, because you have not the means. The Captain says. " Well, no matter if I have or not. I am the owner of this vessel; " (and it may be that he is). And I am not only the owner of the vessel, but of the cargo as well. The whole thing is mine, and the whole thing may be lost; butt hat is no consequence of yours. If it be lost, I shall be the only loser.

Now, suppose it to be clear that that man has not the ability to take his vessel into port. Has the salvor any right? Yes; he can take that vessel out of the possession of the master, and take it into port.

Lord Hannen. — I should like to have authority for that?

Mr Carter. — I do not think that I can give any; but I think that those are the principles of the law of admiralty.

Lord Hannen. — Well, I repeat, I should like to see an authority for it, — that a man any insist on salving a vessel against the wish of the owner.

Mr Carter. — I think it is true; and I will make some effort to discover, if I can, an authority of that kind; and if I an unable to discover one, I will withdraw certainly any assertion to the effect that it is the law, but not the assertion that it ought to be the law until I find some authority against it. It is not the first time that I have heard the proposition stated, however. I have heard it stated by professional brethren.

Now what I have said goes to show that the right of property, whether of nations or of individuals, is not absolute under the law of nature, but is subject to limitations, — limitations of a two-fold character; one, that it is held subject to a trust for the benefit of mankind, another that the use only is given and not the absolute thing itself.

If the absolute thing itself, were given so that the individual had a right to destroy it, then it would not be proper for human society to take note of any attempts to destroy property. But there is, as I have said, a vast deal of legislation on the part of municipal states based on this law of nature of which I speak, based upon this policy, which ought always to animate the jurisprudence of any nation, namely, to prevent the destruction of property. The preservation of property and the increase of the amount of property in a community is, or ought to be — *is* indeed — the first policy of all states. All their legislation (or a great part of their legislation) is directed for the purpose of securing that end. And indeed the extent to which the institution of property is permitted to be carried on is only an illustration of the importance which society attaches to not only the preservation of property but the increase of the amount of it. Society places no limit to the extent to which property may be held. Attention is often called to the enormous fortunes which individuals acquire, especially in recent times, and the question is sometimes asked, why should individuals be permitted to engross property by hundreds of millions?

When we look into the read nature of it, we see that the permission of carrying the institution of property to that extent, of allowing individual possessions to that extent, is only a part of this general, wise and beneficent system which encourages the preservation of property. Those who are most successful in the acquisition of property and acquire it to such an enormous extent, are the very men who are able to control it, and to invest it, and to handle it in the way most useful to society. It is because they have those qualities that they are able to engross it to so large an extent. Now they only own, — in the just sense of the word "own" what they consume; the rest is all held for the benefit of the public. They are the custodians of it; they invest it; and they see it is put to this employment, that employment and another employment. Labour is employed by it, and employed in the best manner and the most productive, and these individuals who acquire these hundreds of millions are really groaning under a servitude to the rest of society, for that is practically their condition, and society really endures it, because it is best for them that it should be so.

Now, I have called the attention of the Tribunal to the various forms and methods in which society manifests and enforces this policy of preserving property and increasing the amount of property, and making the natural bounties of the earth more productive. I have pointed out several of the modes in which that policy is illustrated. I could point out many more. I have this further suggestion to make upon that point, that it is one of the duties particularly incumbent upon civilised societies to take these methods and means of preserving property, and of preserving the sources from which property proceeds; and that is because civilization makes a very dangerous attack upon the fruits of the earth.

The moment the numbers of mankind are increased, the attack which is made upon the fruits of the earth which can support and maintain mankind is proportionately increased, and there is danger, therefore, of destroying them; there is danger of destroying the races of animals; and therefore, with the increased attack which civilisation brings, there comes a corresponding duty resting upon civilization to prevent those attacks from becoming effective. I might instance, — and will by and by bring this argument to bear on the case of, these seals. When these seals were first discovered 100 years ago, they were a blessing tributary only to barbaric man. A few hundreds were all that were taken; and those few hundreds, — it may have been a few thousands, — sufficed to supply all the wants of the inhabitants along the shore where they were found. That was the only attack which the barbaric world made upon this bounty of Providence. But civilization and commerce come in now, and what is the result? The whole world is attacking them. Everybody that wants a seal-skin in Europe, Asia, South America or China is attacking these few remaining herds; and, of course, there is nothing that can withstand that attack unless civilization brings along with it some remedy by which this attack can be resisted and its consequences adverted.

The President. — Did those Indians take the seals at sea or on the islands?

Mr Carter. — At sea.

The President. — At sea?

Mr Carter. — Yes, that was indeed their only mode.

Sir Charles Russell. — At sea.

Mr Carter. — Yes; because there were no inhabitants on the islands, and it was the only mode of catching them.

The President. — It was the original mode.

Mr Carter. — It was the only mode by which they were originally caught. The weapon with which they were thus taken was the spear.

Senator Morgan. — I understand, Mr Carter, that the statutes of the United States claim the property in seals as against their own citizens as an absolute right?

Mr Carter. — Yes.

Senator Morgan. — And protect them by criminal penal enactments.

Sir Charles Russell. — There is no statute that says anything about property in the seals. What statute is referred to?

Mr Carter. — The statute does not say anything about it, but it has the effect.

Sir Charles Russell. — That is another matter.

Mr Carter. — It is the effect of the law.

Senator Morgan. — At all events, they forbid their citizens from taking any seals or having any property in them.

Now suppose this tribunal hold that the United States Government had no property in seals whatever — absolute or qualified, — then, following that decision, would it be the moral duty of the United States to repeal her statutes on that subject.

Mr Carter.— No, I hardly think it would be. If we were going to speak of moral duties, I think the United States, notwithstanding the decision of this Tribunal would be well justified in saying that to allow those animals to be destroyed on the high seas is an inhuman and barbarous practice which we at least will forbid as far as we can.

Senator Morgan. — Suppose the United States concluded to repeal their seal laws on the subject, what would become of the seals?

Mr Carter. — The seals would disappear anyway, whether she repeals her laws or not, if pelagic sealing is allowed to continue. It is not worth while to discuss, at least, I so think, as to what the fate of these seals will be if pelagic sealing is permitted.

Of course, following up the suggestion of the learned Arbitrator, we can easily see this; that the moment when from any cause it ceases to be remunerative to the lessees of the Pribyloff Islands to maintain a watch over these islands, they will leave the islands and give up the watch; and from that moment, of course, the seals are gone, because they will then be subject to the depredations of every marauder that chooses to go there and they will go then like they have gone from the islands of the Southern Pacific. The moment the guard is taken away from the Pribilof Islands, the fate of the seals is sealed.

Now, I must conclude this line of my argument, by summarizing the conclusions which I conceive myself to have established. They are ; —

First. The institution of property springs from and rests upon two prime necessities of the human race :

1. The establishment of peace and order, which is necessary to the existence of any form of society.

2. The preservation and increase of the useful products of the earth, in order to furnish an adequate supply for the constantly increasing demands of civilized society.

Second. These reasons, upon which the institution of property is founded, require that every useful thing, the supply of which is limited, and which is capable of ownership, should be assigned to some legal and determinate owner.

Third. The extent of the dominion which, by the law of nature, is conferred upon particular nations over the things of the arth, is limited in two ways :

1. They are not made the absolute owners. Their title is coupled with a trust

for the benefit of mankind. The human race is entitled to participate in the enjoyment.

2. As a corollary or part of the last foregoing proposition, the things, themselves are not given, but only the *increase* or *usufruct* thereof.

Now I think I will devote the few remaining minutes before the hour of adjournment arrives to the perusal of some authorities bearing upon those which are not in my written argument, but which I have had printed and which I will hereafter afford to our friends on the other side.

The President, — Are those the citations referred to at the first sitting that were left out by the printer?

Mr Carter. — No, not quite those, but the best substitute I have been able to make for them. I have had quite a member of citations sent to me from New York, but they do not include that special list though some of them may belong to it.

The President. — You have not been able to make up that list again?

Mr Carter. — No, I have not been able to make up that, but this is the best substitute I can make, and this is composed of a number of authorities I thought less significant and which I rejected in making up that list, and I have been compelled to use them in the preparation of this.

I wish to read from a passage of which I have already read part from Vattel. This is chapter 18 section 203 :

" Hitherto we have considered the nation merely with respect to itself, without any regard to the country which it possesses. Let us now see it established in a country which becomes its own property and habitation. The earth belongs to mankind in general; destined by the Creator to be their common habitation, and to supply them with food, they all possess a natural right to inhabit it, and to derive from it whatever is necessary for their subsistence, and suitable to their wants. But when the human race became extremely multiplied, the earth was no longer capable of furnishing spontaneously, and without culture, sufficient support for its inhabitants; neither could it have received proper cultivation from wandering tribes of men continuing to possess it in common. It therefore became necessary that those tribes should fix themselves somewhere and appropriate to themselves portions of land, in order that they might without being disturbed in their labour, or disappointed of the fruits of their industry, apply themselves to render those lands fertile, and thence derive their subsistence. Such must have been the origin of the rights of *property* and *dominion* : and it was a sufficient ground to justify their establishment. Since their introduction, the right which was common to all mankind is individually restricted to what each lawfully possesses.

That is the point that private property is due to the necessities of civilization.

And from Schouler, an American writer on the law of personal property from his introductory chapter, part 1 :

Prior to all positive institutions exists the truth that to mankind belong the things of this earth as a gift from above. The right to acquire, and to exercise dominion over these things " to subdue " the earth, as it is said—is universally felt to be a natural right; while the corresponding desire of acquisition is one of the strongest in the human heart; — that which prompts the unlettered and undisciplined savage to plunder and kill for the sake of greedy spoils, but among a well ordered and refined people may be found the mainspring of civilization. Nor

is the gift of external things to the human race absolute and without limitation, for it is conceded to be something designed for beneficial use and not for wanton injury ; to be enjoyed and not to be abused. The inferior animals may minister to our wants ; else they should not be killed and maimed by us for mere pastime, or when the duty of self-protection can afford no reasonable excuse, The soil should be cultivated and improved as far as possible — not ravaged, laid waste, and left desolate, save where some terrible lesson of good to mankind may furnish a sufficient means of justification. Nature teaches the lesson doubly enforced by revelation, that the right of the human race to own and exercise dominion over the things of this earth in successive generations carries with it a corresponding moral obligation to use, enjoy, and transmit in due course for the benefit of the whole human race, not for ourselves only or for those who preceded us, but for all who are yet to come besides, that the grand purpose of the Creator and Giver may be fully accomplished.

Then from CAULFIELD HERON, *an English writer* :

Property is the right of using. The right of property is founded upon its subserviency to the subsistence and well—being of mankind. The institution of property is necessary for social order. The exclusive appropriation of things is essential for the full enjoyment of them... It is the principal foundation of social improvement; it leads to the cultivation of the earth, the institution of government, the establishment of justice. In the right of property Bentham includes four things : 1. The right of occupation; 2. The right of excluding others; 3. The right of disposition; 4. The right of transmission.

Then from Dr GEORGE BOWYER'S, *Commentaries on the Constitutional Law of England:*

The third primary right of the citizen is that of property, which consists in the free use, enjoyment and disposal of all that is his, without any control or diminution, save by the law of the land. The institution of property, that is to say, the appropriation to particular persons and uses of things which were given by God to all mankind, is of natural law. The reason of this is not difficult to discover, for the increase of mankind must soon have rendered community of goods exceedingly inconvenient or impossible consistently with the peace of society; and indeed by far the greater number of things cannot be made fully subservient to the use of mankind in the most beneficial manner unless they be governed by the laws of exclusive appropriation.

The Arbitrators will perceive that these authorities fully support all that I have been endeavouring to lay down.

Then DE RAYNEVAL, *a French writer on the law of nature and nations section* 2, *page* 96:

Property did not exist in the primitive state of the world, and it is no more inherent in human nature than heredity. Originally men did not possess more than the animals possess to-day. The earth was common to all and belonged to no one. When agriculture became necessary for the sustenance of man, each was partial naturally to the earth which he had cleared by the sweat of his brow, and which offered him the fruit and the recompense of his labor; whence the first idea of preservation and property; whence also, the quarrels which the exclusive right must have caused upon the ground that it was invoked for the first time. These quarrels must have finally led to compromises; these compromises introduced the right to enjoy exclusively the earth which each had cleared and cultivated, and this is the most reasonable origin of property. It has then been introduced for the maintenance of peace among men. It has then been the principle of their union and social order.

Then JOHN PENFORD THOMAS, *an English writer, A Treatise of Universal Jurisprudenec.*

All things belonged originally to mankind in common. The benign Giver of all gifts did not distribute them to some to the exclusion of the rest of the species. In the state of a community of things the first bodily occupancy and use of so much only as human wants from time to time required supplied the place of property. In the primitive state every man had a right not to be hindered from using whatever land or produce he had appropriated to himself, as he immediately wanted for rational use, and the bestowment of bodily labour on a thing was the only mode of acquiring a positive title to it. Agriculture could not flourish, nor its fruits be improved, or ripened into maturity. Ingenuity was not sufficiently rewarded, disputes continually arose; the ingenuity and industry of man were checked. Preoccupation by slow degrees communicated with the consent of man either express or implied a right of appropriation; and the introduction of money has greatly extended it. The increased wants improved agriculture, and valuable elegancies of incipient civilization gave birth to the distinctions of property.

Then the passage from Locke I have already read.

The President. — Well I think that will conclude our day's sitting.

Adjourned till to-morrow at 11-30.

TWELFTH DAY. APRIL, 20TH, 1893

Mr Carter. — Mr President, my argument yesterday had a twofold character. It was designed, in the first place, to show that by the established doctrines of the municipal law everywhere adopted the fur-seals were the property of the United States. In the next place, my purpose was, if there were any doubts concerning that conclusion arising out of differences between the nature and habits of the seal and those of other animals in respect to which the municipal law had more particularly spoken, the proper way to remove them was to look to the foundations upon which the institution of property itself stood; and that, if we should find by considering the grounds and reasons upon which the institution of property stood that there were the same reasons for awarding to the United States property in the fur-seals that there were for awarding to any proprietor property in anything, why the conclusion would become, as it seemed to me, irresistible. With that view, I entered into an enquiry into the general foundations of the law of property with the view of showing that property was not founded on robbery or force, or based upon any arbitrary distinctions; but that it was established for great social purposes and to satisfy great social institutions, and that the earth was originally the common property of the race, and that the division of the face of the earth into distinct possessions awarded to different nations did not displace the right of mankind in general to an enjoyment of all the bounties of the earth; that the establishment of the institution of property so far from displacing this right was really the principal means and the effective means by which that right was worked out and made practically available; that consequently, the right of property, whether in nations or in individuals, was subject to two limitations, and the first was that it was not held by an absolute title, that, so far as any nation had more of a thing than its necessities required, it held this superabundance subject to a trust for the benefit of mankind; and that the use of things only was given and not the stock or principal thing, — that that was to be reserved for the benefit of future generations.

I next endeavoured to show that these discussions from the law of nature were confirmed by the actual practice and usage of mankind; that although under municipal law one individual could not call another to account for the abuse of the right of property or for an attempt to destroy it, and that that was for the reason that there was no occasion for any particular methods of correcting abuses of the law of property by individuals the motives of self interest being sufficient for the purpose of protection, that in those special cases even in municipal policy where there

were any dangers that individuals would abuse the right of property the State stepped in and by positive enactment and positive law prevented that abuse.

That that practice of nations still further illustrated that great truth, and that wherever there was a nation or a distinct people in possession of any great bounty of providence, any source of happiness and advantage to mankind, that failed to use it for the benefit of mankind, mankind asserted a right to interfere and take possession of it, and turn it to the general benefit, and to the general account, — that the whole policy of colonization by Christian States of the newly discovered regions of the globe was only a constant illustration of that truth, and of that policy, and that it was defensible upon that ground and that ground alone. It is true that there have been a thousand excesses committed in the course of carrying out the policy of colonization. The excesses cannot be defended, but the thing itself is entirely defensible.

These views, as it seems to me, respecting the origin and foundation of property, and the reasons upon which it stands, furnish a true, complete, and sufficient answer, and the only sufficient answer to all the attacks of socialism upon the institution of property. They show that that institution of property is founded on great social purposes and great social necessities, and founded upon the nature of man himself, and consequently, they assure the everlasting perpetuity of the institution. So long as the nature of man remains unchanged, this institution of property, the most beneficent of all the agencies of civilization will remain also.

In the course of my observations on the value which municipal law assigned to the preservation of property itself, I had occasion to recur to an instance of it which I supposed the law of admiralty furnished, namely in case of salvage; and I stated what I supposed to be the law, that a salvor on the high seas, meeting with a ship that was absolutely disabled and unable to save itself by its own means or its own resources, that ship might be taken possession of by the salvor, even against the will of the master, and even though the master himself were the owner. One of the learned Arbitrators, Lord Hannen, requested to be furnished with an authority on that point. Well, it was rather disturbing to me, I confess, to have a question suggested as to what the law was from a source like that.

Lord Hannen. — I thought you were stating it too broadly; that was all.

Mr Carter. — Yes, I was afraid that I had stated it too broadly; I have no acccess to books of Reports either American or English here, to ascertain fully what has passed into judgment, but I did recur to one of our text writers, and I have something on that subject which may be deemed pertinent. Professor Parsons in his work on maritime law, and which is a work of recognized authority. —

Sir Charles Russell. — Certainly.

Mr Carter. — He himself having been for many years a leading

professor in the principal law school in the United States — that of Harvard — says this.

Sir Charles Russell. — What is the page?

Mr Carter. — It is the 2nd volume of Parsons on Shipping and Admiralty, page 264.

> It has been made a question whether persons forcibly taking possession of a vessel against the will of the master can claim as salvors; but we think it must be obvious and certain that, on the one hand, a master's reluctance or resistance to the saving of the property under his charge should not bar the claim of the salvors, but rather enhance them, if their services were necessary or in all respects meritorious and useful; but on the other hand his opposition would be a circumstance of great weight in determining whether their services were necessary or meritorious.

Sir Charles Russell. — I think that was not a case where the master was owner.

Mr Carter. — I think it was. Do you mean to say that Professor Parsons does not so intend?

Sir Charles Russell. — No, he is I think dealing with the case of the representatives of the owner — the master resisting, not the owner himself.

Mr Carter. — What the case with which he was dealing was, I am not able to say, not having access to any Report, but the principle he lays down is, that the reluctance of the person in charge of the property — his opposition to taking possession of the property does not detract from the claim of the salvor, but rather enhances it; and if that be true in reference to the master of the ship, I rather think it follows as a necessary consequence that it would be true if he were the owner at the same time. If the owner of a vessel is incapable when it is in danger, of saving it by any resources of his own, if he has any right to say to the salvors : " You cannot take possession of it, " he can commit that right to an agent.

It will be my purpose now to endeavour to make an application of these views as to the grounds and reasons upon which the institution of property rests to the particular question, which is before us. The general principles I have gone through at some length. I make no apology for going through with them at that length for the question which this Tribunal has to try is a question of property as between nations. It is the first time as far as I am aware that any such question has ever been submitted to an International Tribunal or indeed to any Tribunal at all, and the decision of it therefore requires a thorough investigation into the grounds and reasons upon which the institution of property stands.

Now in order to apply these views to the case before us, it is necessary, of course, that we should have a more particular and precise view of the facts in relation to the fur-seals themselves and those facts we should take into consideration these separate particulars. In the first place the utility of these animals, next their nature and habits, next the modes

by which they are pursued and captured, next the dangers that threaten the existence of this species of animals, and lastly the means that we can employ to avert those dangers.

The learned Arbitrators will bear in mind, among the conclusions I had reached in respect to the right of property, were these; that it extended to everything which embraces these three conditions: first, that it was an object of utility. of desire to man; secondly, that the supply was limited, that there was not enough for all; and, thirdly, that it was capable of exclusive appropriation.

Now then, first, as to the utility of these animals; that is obvious and conceded. Every part of them is useful to man, — their skins, their flesh and the oil which they afford. But it is their skins chiefly which are useful, as is well known, for the manufacture of a garment of great beauty and utility, and greatly desired all over the world. The extraordinary avidity with which they are pursued is, of course, a full evidence of their utility; and the great price which these skins bear in the market also evidences that fact so completely, that I need not dwell upon it any further.

Now then, as to their nature and habits; where are we to go for our sources of information on that topic? What is the evidence before this Tribunal to which it can resort for the purpose of informing itself respecting those facts?

Now, there are several classes of evidence. In the first place, there is a large body of common knowledge in respect to the animals, their nature and habits which every intelligent person is supposed to possess, and all that may be properly appealed to.

In the next place, there are the works of naturalists of recognised authority which may also be appealed to, written in whatever language. Wherever men have given themselves to those studies to such an extent as to establish themselves as authorities before the world on the topics of which they treat, they may be successfully appealed to as sources from whence a knowledge of facts may be derived.

In the next place, there are the reports of the Commissioners appointed under the terms of the Treaty; and those reports, as will be perceived from examining the Treaty, are made evidence, and, although the joint Commissioners could be personally acquainted with or personally cognizant of only a small part of the facts which are necessary for them to learn, still their reports and their opinions are made evidence not only in relation to facts which fell under their observations, but facts of which they gained their knowledge by such methods as seemed to them suitable and best. And both the joint and separate reports are made alike evidence. I do not say they are made evidence of equal value; but they are both made evidence for the information of this Tribunal.

Then, besides that, we have on both sides a very large number of depositions of witnesses whose testimony has been taken *ex parte*, of course, because there was no opportunity for cross examining; but, ne-

vertheless, they are a source of information in the nature of evidence, of witnesses the best which the nature of the case admits of; and both parties have resorted to it.

Now, upon two of those species of evidence, I have an observation to make as to their relevant and comparative utility and trustworthiness before this body.

First, let me speak in reference to the depositions on the two sides. These will be found, to a certain extent, concurring and conflicting. They are the depositions of witnesses whose characters, stations, and apparent trustworthiness are very different. We have some persons of great intelligence and supposed impartiality, who have had opportunites of observing the habits of these animals. Among these may be mentioned the various Agents of the United States and of the lessees of the United States who have lived upon these Islands for years, and made the seals a subject of observation, — plainly, obviously, the testimony of those whose intelligent observance is entitled to very great weight.

In the next place there are the depositions of other witnesses who have visited the Island from other reasons, but have had means of observation, not so extensive as those to whom I have alluded, but, still, good means of observation; and their evidence is also of considerable weight.

Then we have the evidence of a great number of what I may call common witnesses, the Indians, the Aleuts, the natives on the islands, the Indians along the shore, Indians and whites engaged in pelagic seal ing. There are depositions in multitudes from persons of that character and description. Their opportunities for observation are good. The trouble about them is that their means of expressing themselves are not so good; and in the next place their trustworthiness is by no means so good as the witnesses that I have before mentioned. We know that they belong to a class whose interests, habits and disposition and cultivation do not furnish the strougest assurance that they are speaking the truth, and therefore the testimony of such witnesses must be considered with considerable, and indeed a very great degree of caution.

Now witnesses of this latter class we have upon both sides, and there is one observation which I think it pertinent to make concerning the comparative trustworthiness of the witnesses upon the side of the United States, and upon the side of Great Britain. In the British Counter Case will be found various affidavits tending to show that the persons whose affidavits were given in the Case of the United States were not correctly, reported by the persons who took their affidavits — statements by them that they did not say the things which were imputed to them; and this impeaching evidence of course goes very far, necessarily, to discredit those witnesses. Where it is shown that a witness has made two statements at two different times, it does not show, indeed, which one of the statements is true or whether either of them is true; but it does show that that witness is not to be credited. The number of instances however

in which the testimony of witnesses on the part of the United States have been successfully impeached on those grounds are comparatively few; the great bulk of testimony remains unimpeached.

Now the value of testimony of this character of course depends very largely upon whether the side against which it has been used, or sought to be used, has had an opportunity of scrutinizing it, of subjecting it to criticism and of impeaching it in the various ways in which the testimony of a witness can be impeached. If it passes that ordeal, that is one very considerable evidence in its favour; and it may be the more properly relied on if it has succesfully passed such an ordeal as that. All the testimony of this character, or substantially all, upon which the Government of the United States relies, has been freely and fully submitted to Great Britain, and to its Agents, for the purpose of criticism and impeachment. Their testimony of the same character however has never been snbmitted to us. I have already remarked, in speaking upon a motion which was before this body, of the inequality to which the United States was subjected in that particular. I have remarked upon the plain and obvious advantages which Great Britain had in the way of refuting criticism and impeaching the testimony of our witnesses. I have now to say in view of the circumstance that ours was submitted to them, and that they chose without any good reason to reserve theirs from our criticism, that ours is entitled to the greater credit wherever it comes in conflict. So much for the testimony of these witnesses. I am not going to criticise them unduly because I have not the time, and that work will be performed by another.

Now I have some observations to make in reference to the comparative merits of these joint and several reports of the Commissioners.

Senator Morgan. — Do you make any motion to exclude that part of the testimony, in the British counter-case which you say ought to have gone into the case?

Mr Carter. — No we have made none. I pointed out the difficulties which would attend the making of such a motion, the embarrassing results which success upon such a motion would lead to; and the final conclusion of those who represent the United States, was that they would accept that testimony on the whole and deal with it, with its weight, its credibility and its trustworthiness, by bringing to bear upon its trustworthiness the considerations which I have now mentioned. We would accept it, but in commenting upon its weight and trustworthiness before this Tribunal we should rely very largely upon this circumstance, that our testimony of this sort was submitted to them, and they carefully reserved theirs from our attack.

Now as to these reports, what was the purpose for which these joint commissioners were appointed? I have spoken to that point already in what I have said upon the arguments of the motion to which I have referred. The idea was originally suggested in the scheme of settlement which Sir Julian Pauncefote proposed to Mr Blaine.

Senator Morgan. — Do you mean the draft convention?

Mr Carter. — That draft convention in 1890. It proceeded upon the statements by Sir Julian Pauncefote that the two Governments were not agreed as to what the facts were in reference to seal life, and the modes by which they were respectively pursued upon the sea and upon the islands; that if they were agreed upon the facts it would be probably easy to settle the controversy by a convention and that the proper thing was to make an attempt to arrive at an agreement upon the facts, and that was, to appoint men of intelligence, men of science — in one word experts, whose testimony could be trusted for that joint commission, and send them out to the islands; for them to make an investigation of all the facts connected with seal tife and the modes by which the seals were procured, and report those facts; and report what, in their opinion, would be a set of regulations designed to preserve the seals from extermination.

The idea, therefore, assumed that those joint Commissioners were persons who were entirely to be trusted — trusted as to their intelligence, as to their impartiality, as to their scientific attainments, and as to all qualities which serve to recommend the opinions of men to each other. They were to be a commission of experts. My learned friend, Sir Charles, made the observation, while he was speaking upon this motion, that it did not appear to him that there was any particular sanctity connected with these reports of these joint Commissioners. I beg leave to differ with him upon that point. There was a great deal of sanctity, using that word in the sense of " importance " attaching to them. It was supposed that these joint Commissioners would furnish these two Governments with the absolute truth upon the questions which they were appointed to examine, and that they would so furnish them with the truth, that there would be no difficulty in reaching an adjustment of the controversy, on the basis of the establishment of regulations designed to preserve the seals. That was the view upon which these joint Commissioners were appointed, and we have their reports here. These gentlemen, were all of them, men of the highest character, high attainments, perfectly competent, all of them, to make a thorough investigation of the questions submitted to them; and to ascertain the truth, and to make that truth apparent in their reports. The Commissioners on the part of the United States adopted that view of their functions. They conceived that they had nothing to do with the differences between the two Governments — that the question whether the United States had a superior claim or right, to that of citizens of other nations, to these seals, was something with which they had no concern; that the question whether the citizens of other nations had the right to pursue the seals on the high seas was a question with which they had no concern; that the only point which they were to investigate was what methods must be pursued in order that the race of fur-seals may be preserved from extinction? In other words they looked upon the question not in the light of *facts*, that here are different powers, both of them capable of reaching the seals — the United States capable of reaching them on the land, and the other nations capable of reaching them on the

sea — and that it was no common authority which could control those rights. They did not look upon it in that point of view but they looked upon it as if the whole world was one country, and as if all mankind had the same interest; and the question, and the only thing to be ascertained, was, what measures were necessary in order to preserve these seals, leaving the question as to whether those measures could be adopted — as to whether they were agreeable to those different countries, — to be settled by diplomatic agencies which had power over such questions.

This is what the Commissioners of the United States say as to what they conceived their functions to be. I am reading now from page 315 of the case of the United States.

Desiring to remove every obstacle in the way of the immediate consideration of this subject, the question of the formality of the conference was waived on our side, and the formal meeting of the Commissioners in joint Conference began on the afternoon of February 11, at the Department of State.

Mr Joseph Stanley-Brown was selected as the secretary of the joint commission on the part of United States, and Mr Ashley Froude on the part of Great Britain. In determining the nature of the conference it was agreed that in order to allow of the freest possible discussion and presentation of views, no formal record of the proceeding should be kept and that none but the four members of the commission should be present during its deliberations. In further attempting to remove all restrictions upon the fullest expression of opinions during the conference, it was agreed that in our several reports no reference to persons, as related to views or opinions expressed by members of the commission during the conference, should be made.

Meetings of the joint commission were held almost daily from the 11th of February until the 4th of March, on which day the joint report was signed, and the conference adjourned *sine die*.

Early in the progress of the conference it became evident that there were wide differences of opinion, not only as to conclusions, but also as to facts. It seems proper here to refer briefly to the attitude of the Commissioners on the part of the United States or to the standpoint from which they endeavoured to consider the questions involved.

The instructions under which we acted are contained in Article IX of the Arbitration Convention, and, as far as relates to the nature of the inquiry, are as follows.

" Each Government shall appoint two Commissioners to investigate conjointly with the Commissioners of the other Government all the facts having relation to seal life in Behring sea, and the measures necessary for its proper protection and preservation. "

This sentence appears to be simple in its character and entirely clear as to its meaning. The measures to be recommended were such as in our judgment were necessary and sufficient to secure the proper protection and preservation of seal life. With questions of international rights, treaty provisions, commercial interests, or political relations we had nothing to do. It was our opinion that the considerations of the joint Commission ought to have been restricted to this phase of the question, so clearly put forth in the agreement under which the Commission was organized, and so evidently the original intent of both Governments when the investigation was in contemplation.

Had the preservation and perpetuation of seal life alone been considered, as was urged by us, there is little doubt that the joint report would have been of a much more satisfactory nature, and that it would have included much more than a mere reiteration of the now universally admitted fact that the number of seals on and frequenting the Pribilof Islands is now less than in former years, and that the hand of man is responsible for this diminution.

That our own view of the nature of the task before us was not shared by our

colleagues representing the other side was soon manifest, and it became clear that no sort of an agreement sufficiently comprehensive to be worthy of consideration and at the same time definite enough to allow its consequences to be thought out, could be reached by the joint Commission, unless we were willing to surrender absolutely our opinions as to the effect of pelagic sealing on the life of the seal herd, which opinions were founded upon a careful and impartial study of the whole question, involving the results of our own observations and those of many others. Under such circumstances, the only course open to us was to decline accede to any proposition which failed to offer a reasonable chance for the preservation and protection of seal life, or which, although apparently looking in the right direction was by reason of the vagueness and ambiguity of its terms, incapable of definite interpretation, and generally uncertain as to meaning. In obedience to the requirements of the Arbitration Convention that the four Commissioners shall, so far as they may be able to agree, make a joint report to each of the two Governments, the final output of the joint Commission assumed the form of the joint report submitted on March 4th, it being found impossible in the end for the Commissioners to agree upon more them a single general proposition relating to the decadence of seal life on the Pribilof islands. It therefore becomes necessary, in accordance with the further provision of said Convention for us to submit in this, our separate Report a tolerably full discussion of the whole question, as we view it from the standpoint referred to above as being the only method of treatment which ensures entire independence of thought or permits a logical interpretation of the facts.

Now let me say that the British Commissioners took an entirely different view of their functions. Their view was, that here was a herd of seals having its home on the Pribilof islands, and which affords certain superior advantages and facilities to the Government of the United States for taking them on the islands. On the other hand, these seals are, during a large part of the year in the high seas, and there they can be pursued by the citizens of other nations. Under these circumstances, they said to themselves, the citizens of other nations have the same right to pursue them on the sea that the United States have to take them on the land, and our function and our office is to contrive such regulations consistent with that supposition of respective national rights as will best tend to preserve the seals. Now that fact is manifest all over their report, but I will read a section or two which serves to bring it out very clearly. Section 123 of the Report of the British Commissioners which witl be found on page 20, is to this effect.

Besides the general right of all to hunt and take the fur-seal on the high seas, there are, however, some special interests in such hunting, of a prescriptive kind, arising from use and immemorial custom, such as those of the "natives" of the Pribilof islands, and of the inhabitants of the Aleutian islands, of South-eastern Alaska, of the coast of British Columbia, and of the State of Washington. There are also rights dependent on local position, such as those of the Governments possessing the breeding islands and those controlling the territorial waters in or adjacent to which the seals spend the winter half of the year. Such rights do not, however, depend on position only, but also on the fact that the seals necessarily derive their sustenance from the fish which frequent these waters, which, if not thus consumed by the seals, would be available for capture by the people of the adjacent coasts. The rights of this kind which flow from the possession of the breeding islands are well known and generally acknowledged, but those of a similar nature resulting from the situation of the winter home of the seal along the coast of British Columbia have not till lately been fully appreciated.

124. Referring more particularly to the Pribilof islands, it must perhaps be assu-

med that no arrangement would be entertained which would throw the cost of the setting apart of these islands as breeding grounds on the United States Government, together with that of the support of some 300 natives.

It may be noted, however, that some such arrangement would offer perhaps the best and simplest solution of the present conflict of interests, for the citizens of the United States would still possess equal rights with all others to take seals at sea, and in consequence of the proximity of their territory to the sealing grounds, they would probably become the principal beneficiaries.

125. Any such disinterested protection of breeding islands either by Russia or the United States would possess the extreme simplicity of being entirely under the control of a single Government, whereas in every other project it becomes necessary to face the far more difficult problem of international agreement to some code of regulations involving an accompanying curtailment of rights. In other words any such arrangement must he viewed either as a concession of certain rights on the high seas, or a concession of peculiar rights devolving from territorial possession of the breeding islands of the seal, made in each case for the purpose of inducing equivalent concessions on the other side in the common interest.

126. For practical purposes, the main consideration is that any scheme of measures of protection shall absolutely control, so for as may be necessary, any and every method of taking seals; and from industrial considerations, and in order properly to determine on reciprocal concessions, it is necessary to assume some ruling principle in accordance with which these shall be governed, and such may be found, in a rough way, in postulating a parity of interests as between, pelagic sealing and sealing on the breeding islands. This would involve the idea that any regulation of the fishery, as a whole, should be so framed as to afford as nearly as possible an equal share in benefit or proceeds to these two interests.

There we see the views upon which these Commissioners on the part of Great Britain proceed. They conceived that here was a conflict between the right of nations and that that must be taken into account in any consideration of measures necessary for the preservation of the seal, because that conflict between the different rights of nations could not be settled by any scheme of Regulations which would in effect take away the supposed right of one nation — the seals must perish before that could be done. They conceived that they might postulate, as they call it, a parity of circumstances between the United States having the control of breeding places, and the pelagic sealers who could pursue them at sea; and all their investigations, their opinions and their reports are made upon that basis.

In other words they conceive themselves to be in charge of the interests of pelagic sealing, which is for the most part represented by the interest of Canada. They conceived themselves to be in charge of their interest bound to defend it, and consequently their report will be found to be, from one end to the other, a defence of the interests of pelagic sealing. That is the character of it, and I do not mean to complain of this, or to urge it against these distinguished gentlemen who were the authors of this report as any piece of unfairness on that ground. I only state the fact that that was their conception of their duties and that we must take that fact into account in considering their report. That is a pretty decisive fact. In what category does it put them? Why they are partisans, just right off, just as much as my friends on the other side are, here. They are defending from the beginning to the end the interests of pelagic sealing.

How does that operate upon the evidence which this Tribunal ought to place on their conclusions? It is entirely destructive — that is the simple matter of it — except as to a very limited extent. Where these gentlemen speak and testify as to facts which they say fell under their personal observation, of course they are to be treated as witnesses of those facts of the most unimpeachable character, but, nevertheless, witnesses acting under a strong bias. Where, on the other hand, they proceed to give us their opinions as to what the facts are, their opinions are to be discarded altogether as being the opinions not of impartial but of partial observers, which are like the opinions of Counsel, and differ in no respects from them. That, I venture to say, was an entirely erroneous construction of their duties as marked out by the Treaty. The conception of the Treaty was that the opinions of these gentlemen as to facts should have the highest value, and should prove the existence of the facts themselves quite independently of the question as to whether they had actually observed the facts themselves.

What the two Governments wanted to know was what the facts were. They sent these Commissioners there to inquire what the facts were. Of course they could not ascertain them all, or anything but a very small part of them, by personal observation. They sent them, therefore, to make inquiries and to communicate to the two Governments concerning the results of their enquiries upon questions of fact; and therefore their opinions were designed to be, and, if they acted in accordance with this conception of their functions would justly be, evidence of the facts themselves. They were to make *joint* inquiries too; but I would not draw a very close line between the modes by which they gained their information. If they had the proper conception of their functions, their opinions, drawn from the best sources which were open to them as to the facts and as to the measures necessary for the preservation of the fur-seal, would be regarded as evidence of those facts, and evidence of the highest character. But it all depends upon the question whether they were acting impartially, and whether they were acting in accordance with the conception of their duties under which they were appointed.

The President. — In point of fact, they made separate observations. did they not?

Mr Carter. — Yes; they did make separate observations. Of course, the general intent of the Treaty undoubtedly was that these observations were to be joint, but if both sets of Commissioners had acted in accordance with the conception of their duties which is marked out in the Treaty, I do not think that any serious differences would have arisen between them upon facts which they did not jointly investigate.

Now, with these observations concerning the relative weight which is to be assigned to the Reports of these Commissioners, I proceed to state the facts in reference to the nature and habits of the seals; and for that purpose I shall employ the Report of the American Commissioners, for it states them with the greatest precision and with the greatest apparent impar-

tiality; and I think it will be found that the statement of facts thus made by them is abundantly established by the testimony in the Case.

The President. — Do you intend to indicate the points of fact upon which both sets of Commissioners were agreed, or do you intend to indicate merely the American observations?

Mr Carter. — I intend to take the American observations, — the Report of the American Commissioners as to the nature and habits of the fur-seals.

The President. — Without noticing whether the Commissioners of Great Britain concurred?

Mr Carter. — Without noticing whether the British Commissioners, concurred or not. I shall point ont presently that the British Commissioners, although their Report contains a multitude of doubts as to whether this thing or that thing is true, and conjectures that this or that other thing may be true, yet when you come to see whether they really dissented from this statement of facts by the American Commissioners, the dissent will be found to be of a very small amount.

Now, as to the facts in the life-history of the fur-seals, I will read from page 75 of my Argument.

The Northern fur-seal (*Callorhinus ursinus*) is an inhabitant of Bering Sea and the Sea of Okhotsk, where it breeds on rocky islands. Only four breeding colonies are known, namely, (1) on the Pribilof islands, belonging to the United States; (2) on the Commander Islands, belongiug to Russia; (3) on Robben Reef, belonging to Russia; and (4) on the Kurile Islands, belonging to Japan. The Pribilof and Commander Islands are in Bering Sea; Robben Reef is in the Sea of Okhotsk; near the island of Saghalien, and the Kurile Islands are between Yezo and Kamchatka. The species is not known to breed in any other part of the world. The fur-seals of Lobos Island and the south seas and also those of the Galapagos Islands and the islands off lower California, belong to widely-different species, and are placed in different genera from the Northern fur-seal.

In winter the fur-seals migrate into the North Pacific Ocean. The herds from the Commander Islands, Robben Reef, and the Kurile Islands move south along the Japan coast, while the herd belonging to the Pribilof Islands leaves Bering Sea by the eastern passes of the Aleutian chain.

3. The fur-seals of the Pribilof Islands do not mix wiith those of the Commander and Kurile Islands at any time of the year, In summer the two herds remain entirely distinct, separated by a water interval of several hundred miles; and in their winter migrations those from the Pribilof Islands follow the American coast in a southeasterly direction, while those from the Commender and Kurile Islands follow the Siberian and Japan coast in a southwesterly direction, the two herds being separated in winter by a water interval of several thousand miles.

This regularity in the movements of the different herds is in obedience to the well-known law that *migratory animals follow definite routes in migration, and return year after year after year to the same places to breed.* Were it not for this law, there would be no such thing as stability of species, for interbreeding and existence under diverse physiographic conditions would destroy all specific characters.

The pelage of the Pribilof fur-seals differs so markedly from that of the Commander Islands fur-seals that the two are readily distinguished by experts, and have very different values, the former commanding much higher prices than the latter at the regular London sales.

4. The old breeding males of the Pribilof herd are not known to range much south of the Aleutian Islands, but the females and young appear along the American coast

as far south as northern California. Returning, the herds of females move northward along the coasts of Oregon, Washington and British Columbia in January, February, and March, occurring at varying distances from shore. Following the Alaska coast northward and westward, they leave the North Pacific Ocean in June, traverse the eastern passes in the Aleutian chain, and proceed at once to the Pribilof Islands.

Their migrations as described in this Report are roughly represented on *this* map. When they leave the Pribilof Islands in the autumn, they go on their southern migration, taking *this* general course to the coast of California and comparatively speaking, widely dispersing.

[*Describing the course on the map.*]

On their return, they follow a course nearer the shore passing throngh the eastern passes of the Aleutian chain back to the Pribilof islands.

The President. — Do you mean that they pass in the territorial waters, — you mentioned that they passed near the coast?

Mr Carter. — Do you mean the territorial waters within 3 miles of the shore?

The President. — Well, I meant what is usually meant.

Mr Carter. — I believe never. Of course, scattered seals may occasionally go in; but as a herd never, I think, in as near the shore as that. When they go through the passes of the Aleutian chain, — those narrow places, — very likely they pass within that distance of the shore.

Senator Morgan. — I think there is some testimony to show that the fur-seals have sometimes entered and been captured in the straits of Fuca.

Mr Carter. — Yes; there is a great deal of suggestion here and there of evidence of a conjectural character, that seals visit this place, haul out on that place,and breed on other places than the Pribiloff islands. I am taking now, as correctly representing the facts as established by the evidence, the Report of the views of the American Commission. I feel myself tolerably certain that when their Report comes to be compared with the evidence and when all the evidence is thoroughly sifted, it will be found that their statement will stand in the main as a truthful and accurate account.

Senator Morgan. — Is their statement based on the same evidence that this Tribunal has to consider; or is it based on facts which have come to their knowledge as Experts?

Mr Carter. — Upon both sorts of evidence. Their statements have the character of evidence. They were appointed for the purpose of giving their opinions upon these questions; and their opinions from whatever sources derived, are therefore, evidence of the facts which they state. They are original evidence of those facts which need not be substantiated. At the same time, they are substantiated by the great weight, as we think the overwhelming weight, of the testimony which is before this Tribunal.

Senator Morgan. — I suppose the same effect is conceded to the Report of the Commissioners on the part of Great Britain?

Mr Carter. — I have had occasion to observe that so far as the opinion of those Commissioners goes as to facts, — so far as their statements purport to be based on other observations than their own, I have submitted grounds and reasons which lead me to the belief, and which I think will lead the Tribunal, or should lead the Tribunal, to the belief, that those statements are not to be taken where they conflict with the statement of the American Commission.

The President. — You take the American opinions as evidence ?

Mr Carter. — I do.

The President. — And reject the British opinions as evidence ?

Mr Carter. — I do in general, and that for the reasons stated, that the opinions of the American Commissioners are in pursuance of the duties imposed upon them by the terms of the Treaty, in accordance with their conception of their functions based on the Treaties, and the views of the British Commissioners are based on different conceptions.

5. The old (breeding) males reach the islands much earlier, the first coming the last week in April or early in May. They at once land and take stands on the rookeries, where they await the arrival of the females. Each male (called a bull) selects a large rock, on or near which he remains until August, unless driven off by stronger bulls, never leaving for a single instant, night or day, and taking neither food nor water. Both before, and for sometime after the arrival of the females (called cows) the bulls fight savagely among themselves for positions on the rookeries and for possession of the cows, and many are severely wounded. All the bulls are located by June 20.

6. The bachelor seals (holluschickie) begin to arrive early in May, and large numbers are on the hauling grounds by the end of May or first week of June. They begin to leave the islands in November, but many remain into December or January, and sometimes into February.

7. The cows begin arriving early in June, and soon appear in large schools or droves, immense numbers taking their places on the rookeries each day between the middle and end of the month, the precise dates varying with the weather. They assemble about the old bulls in compact groups, called harems. The harems are complete early in July, at which time the breeding rookeries attain their maximum size and compactness.

8. The cows give birth to their young soon after taking their places on the harems, in the latter part of June and in July, but a few are delayed until August. The period of gestation is between eleven and twelve months.

9. A single young is born in each instance. The young at birth are about equally divided as to sex.

10. The act of nursing is performed on land, never in the water. It is necessary, therefore, for the cows to remain at the islands until the young are weaned, which is not until they are four or five months old. Each mother knows her own pup, and will not permit any other to nurse. This is the reason so many thousand pups starve to death on the rookeries when their mothers are killed at sea. We have repeatedly seen nursing cows come out of the water and search for their young, often travelling considerable distances and visiting group after group of pups before finding their own. On reaching an assemblage of pups, some of which are awake and others asleep, she rapidly moves about among them, sniffing at each, and then gallops off to the next. Those that are awake advance toward her, with the evident purpose of nursing, but she repels them with a snarl and passes on. When she finds her own, she fondles it a moment, turns partly over on her side so as to present her nipples, and it promptly begins to suck. In one instance we saw a mother carry her pup back a distance of 15 metres (50 feet) before allowing it to

nurse. It is said that the cows sometimes recognize their young by their cry, a sort of bleat.

11. Soon after birth the pups move away from the harems and huddle together in small groups, called "pods", along the borders of the breeding rookeries and at some distance from the water. The small groups gradually unite to form larger groups, which move slowly down to the water's edge. When six or eight weeks old the pups begin to learn to swim. Not only are the young not born at sea, but if soon after birth they are washed into the sea they are drowned.

12. The fur-seal is polygamous, and the male is at least five times as large as the female. As a rule each male serves about fifteen or twenty females, but in some cases as many as fifty or more.

13. The act of copulation takes place on land, and lasts from five to ten minutes, Most of the cows are served by the middle of July, or soon after the birth of their pups. They then take the water, and come and go for food while nursing.

14. Many young bulls succeed in securing a few cows behind or away from the breeding harems, particularly late in the season (after the middle of July, at which time the regular harems begin to break up). It is almost certain that many, if not most, of the young cows are served for the first time by these young bulls, either on the hauling grounds or along the water front.

These bulls may be distinguished at a glance from those on the regular harems by the circumstance that they are fat and in excellent condition, while those that have fasted for three months on the breeding rookeries are much emaciated and exhausted. The young bulls, even when they have succeeded in capturing a number of cows, can be driven from their stands with little difficulty, while (as is well known) the old bulls on the harems will die in their tracks rather than leave.

15. The cows are believed to take the bull first when two years old, and deliver their first pup when three years old.

16. Bulls first take stands on the breeding rookeries when six or seven years old. Before this they are not powerful enough to fight the older bulls for positions on the harems.

17. Cows, when nursing, regularly travel long distances to feed. They are frequently found 100 or 150 miles from the islands, and sometimes at greater distances.

18. The food of the fur-seal consists of fish, squids, crustaceans, and probably other forms of marine life also. (See Appendix E).

19. The great majority of cows, pups, and such of the breeding bulls as have not already gone, leave the islands about the middle of November, the date varying considerably with the season.

20. Part of the nonbreeding male seals (holluschickie), together with a few old bulls, remain until January, and in rare instances until February, or even later.

21. The fur-seal as a species is present at the Pribyloff Islands eight or nine months of the year, or from two-thirds to three-fourths of the time, and in mild winters sometimes during the entire year. The breeding bulls arrive earliest and remain continuously on the islands about four months; the breeding cows remain about six months, and part of the nonbreeding male seals about eight or nine months, and sometimes throughout the entire year.

22. During the northward migration, as has been stated, the last of the body or herd of fur-seals leave the North Pacific and enter Bering Sea in the latter part of June. A few scattered individuals, however, are seen during the summer at various points along the Northwest Coast; these are probably seals that were so badly wounded by pelagic sealers that they could not travel with the rest of the herd to the Pribilof islands. It has been alleged that young fur-seals have been found in early summer on several occasions along the coats of British Columbia and southeastern Alaska. While no authentic case of the kind has come to our notice, it would be expected from the large number of cows that are wounded each winter and spring along these coasts and are thereby rendered unable to reach the breeding rookeries and must perforce give birth to their young — perhaps prematurely — wherever they may be at the time.

23. The reason the northern fur-seal inhabits the Pribyloff Islands to the exclusion of all other islands and coasts is that it here finds the climatic and physical conditions necessary to its life wants. This species requires a uniformly low temperature and overcast sky and a foggy atmosphere to prevent the sun's rays from injuring it during the long summer season when it remains upon the rookeries. It requires also rocky beaches on which to bring forth its young. No islands to the northward or southward of the Pribilof islands, with the possible exception of limited areas on the Aleutian chain, are known to possess the requisite combination of climate and physical conditions.

All statements to the effect that fur-seals of this species formerly bred on the coasts and islands of California and Mexico are erroneous, the seals remaining there belonging to widely different species.

That is all that I propose to read at present from this report, and it gives a general description of the nature and habits upon these islands — the condition of the life upon the islands, and the facts attending the migration of the seal. There are some further propositions or matters of fact in addition to this which I desire to lay before the Arbitrators, together with what I have thus read from this report; and first I read what is our view of these facts which will be found on page 79.

FIRST. In addition to the climatic and physical conditions above enumerated as necessary to render any place suitable for a breeding ground for the seals, exemption from hostile attack or molestation by man, or other terrestrial enemies, should be included. The defenceless condition of these animals upon the land renders this security indispensable. If no terrestrial spot could be found, possessing the favorable climatic and physical requirements above mentioned and which was not at the same time exempt from the unregulated and indiscriminate hostility of man, the race would speedily pass away.

SECOND. The mere presence of man upon the breeding places does not repel the seals, nor operate unfavorably upon the work of reproduction. On the contrary, the presence and the protection which he alone is capable of affording, by keeping off marauders, are absolutely necessary to the preservation of the species in any considerable numbers.

That statement is of course substantiated by what we know respecting the numbers of seals of similar character in the South Seas in former periods — they existed in great multitudes; not, however, being protected on the breeding places by men, they were visited by vessels fitted out for their capture, and were very speedily destroyed.

Then :

THIRD. If man invites the seals to come upon their chosen resorts, abstains from slaughtering them as they arrive, and cherishes the breeding animals during their sojourn, they will as confidently submit themselves to his power as domestic animals are wont to do. It then becomes entirely practicable to select and separate from the herd for slaughter such a number of non-breeding animals as may be safely taken without encroaching upon the permanent stock.

That statement, if disputed would be abundantly proved by the evidence. We know, of course, from experience on these islands that the mere presence of man does not repel the coming of the seals at all. They come up and land with perfect confidence, knowing that they will not be disturbed and after a time it is perfectly possible for man to separate

from the herd the non-breeding males. They are not permitted to mingle with the herd. They do not land upon these harems; the old bulls drive them away, and it is not until they are 6 or 7 years old that they are fit for service or are called upon to serve upon the rookeries, and until they are of that age, they haul out (as it is called) either upon the regions beyond the rookeries or on the beaches or sandy places somewhere away from them. While those which haul out by themselves, these young males, being separated from the rest of the herd can be driven to a convenient place for slaughter from the place where they are, without creating any disturbance to the breeding rookeries. Then :

Fourth. If the herd were exempt from any depredation by man, its numbers would reach a point of equilibrium at which the deficiency of food, or other permanent conditions, would prevent a further increase. At this point, the animal being of a *polygamous* nature, an annual draft from nonbreeding males might be made by man of 100,000 — perhaps a larger number — without causing any appreciable diminution of the herd.

Now the fact that is there stated, that if these animals were not disturbed at all by man, the numbers of the herds would eventually reach a maximum at which they would repose, was fully stated, explained and justified by the American Commissioners in their report. It is, I suppose, a perfectly familiar conclusion to all naturalists, that all races of animals if undisturbed by man, of course, have a tendency to increase; but they are subject to attacks of enemies other than man, and there are certain causes at all times operating upon them, which would eventually prevent their increase beyond a certain amount. If this were not so, of course the animal races would fill the seas eventually.

Now, in the case of the fur seals, they do have enemies other than man. We do not know what all their enemies are. Their greatest marine enemy is known and it is the killer-whale which follows these herds and makes its attack upon them, and doubtless kills a great many. How many of those that are born every year are thus killed by their natural marine enemies, there is, of course, no means of determining.

The President. — Is the killer-whale hunted and destroyed by man?

Mr Carter. — No, I do not know that it is. I never heard that it was.

The President. — It is not an object of whaling.

Senator Morgan. — I think it is a whale that yields oil and whalebone, and if it is, it is hunted by man assiduously and killed.

Mr Carter. — That may be true, but I never heard myself that the killer whale was hunted by man. I thought its means of escape were too great.

Lord Hannen. — Is it really a whale?

Mr Carter. — I rather supposed myself that it was a species of shark, and I have been told by old whale men whom I have seen during my life that the killer whale-is an animal with extremely large sharp teeth, and he follows even old whales — pursues them with the idea of getting his head

into their mouth, so that he can yet at the whale's tongue. That is his idea of pursuing them. I thought myself that his means of escape were so great that he did not form an object of human pursuit. It may be otherwise, but I do not know.

It is suggested to me that the killer whale is a small whale, and not taken either for its bone or its oil. That is what I shall venture to state as our view of the facts.

The President. — Then for the purposes of protection man does not attack this killer whale, for the sake of preserving the seal herds.

Mr Carter. — No, man does not extend his protection to the herd in that direction.

Now if this herd of seals were left to its natural enemies as I have said, it would increase to a certain maximum point, which point would be determined by the operation of various causes, sufficiency of food would be one. That would furnish a natural limit to the increase of the herd. Another limit to the increase of the herd would be, if left to natural conditions, the contests among the males themselves for the possession of the females. Of course, as presumably there is an equal number of males and females born every year, and as the animal is in a high degree polygamous, one male answering for any where between 20 to 40 and 50 females, there are tremendous conflicts between the males for gaining possession of the females on the rookeries, and those contests are very deadly, and result disadvantageously upon seal life upon the rookeries in different ways. In the first place it leads to the slaughter of a great many males, and in the next place it interferes very greatly with the process of reproduction during the season of reproduction. The way in which these contests between the males operate to reduce the numbers of the herd is evidenced in various other classes of highly polygamous animals, as the buffalo or American bison, now nearly extinct. That was highly polygamous, and the extent to which old males were disabled and killed by conflicts with each other was very great, and I believe the same thing is true in all cases with animals that are highly polygamous, such as deer, and elk, and moose.

The President. — Are the males that are killed picked up far the use of their furs, when they are killed by one another.

Mr Carter. — I apprehend not.

The President. — They are quite lost.

Mr Carter. — The breeding rookeries are left undisturbed as far as possible — They could not be recovered without going among the rookeries for the purpose of taking them, and when the supply of males is not excessive of course the conflicts are less in number and not so fatal in character. Now taking this herd of seals when it has reached its maximum under conditions where it is not disturbed by man, if man appears upon the scene and makes a draught upon it he can-take a certain number without affecting the normal numbers of the herd. That arises from the circumstances that the animal is polygamous in its character. If he

takes no females but confines his draughts to males and leaves enough males for the service of the whole herd he does not touch the birth rate of the herd, consequently there still continue to be as many born as before and the herd would preserve its numbers at that maximum point suffering of course a slight diminution at first in the number of males taken.

The President. — Do you mean that that would be a source of peace-making and consequently a sort of taming of the animals and changing their life — domestication?

Mr Carter. — No, I do not mean it in that sense.

The President. — If you suppress the occasion of fighting between them of course you make them tamer.

Mr Carter. — We dont suppress that. You affect them to a slight degree but not to a sufficient degree to make any appreciable difference. You still leave a large number. You still leave a superfluous number. There are still abundant contests after you have made your draught.

The President. — That is not one of the modes of acting upon these animals and domesticating them then?

Mr Carter. — It is what I call a " husbandry ". I do not go so far as to say that it makes a substantial change in their nature, I only assert that fact. If you can take a very large number from them without in any degree diminishing the normal numbers of the herd, though you will diminish it at first of course — if you have a herd of 5 000 000 male and female and take 100 000 you diminish the herd at first by that 100 000, but you will soon reduce the size of the herd to a number after which this annual draught of 100 000 (which is what I assume) will not further affect the normal number of the herd ; they will continue the same. Of course it is the same with seals as with-any other polygamous animal — sheep horses or cows you can take a certain number of males without diminishing in any degree the number of the herd. It is matter not of scientific knowledge. It is a matter not of abstruse investigation, but a matter of common barn-yard observation — that is all it is !

Now I have stated as a fact which I suppose to be capable of substantiation that taking this particular herd of seals, you can make a draft upon it of 100,000 young males without any danger to the stock, and without diminishing the normal regular numbers of the herd. Well, what is the evidence upon which that statement can be supported. Of course, experience must alone determine the question of how many you can take, because we do not know what the number is of any sort of animals on the islands. We do not know how many males there are. We do not know how many females there are, and we do not know how many are destroyed annually. We have no knowledge of that sort to appeal to, and, of course, we must rely upon experience alone. But we have a very large experience.

The President. — Are the seals counted? I suppose one does not know their numbers.

Mr Carter. — No, attempts have been made to estimate their

numbers in ways like these. Those occupying a space, say, of 100 feet square would be counted, and then the whole area would be ascertained, and upon the assumption that each 100 feet contained as many, a computation of that sort would be made; but all accounts now agree that all methods relied upon for the purpose of determining what the precise number is, are only misleading. You can say that there is more than 1,000,000, but whether there are 2,000,000 or 3,000,000, or 4,000,000 or 5,000,000 no man knows or can know.

Conjectures have been made and the fact has been stated by observers based on conjecture, and those statements have received a certain degree of credence; but the result of the evidence is that it is impossible to deal, with any approach even to precision, with the numbers there are; and the failure to reach accuracy is so complete, that it is best not to rely upon any attempts.

The President. — As a matter of fact, the herdsman does not know much of his herd except killing part of the increase?

Mr Carter. — He does not know how many there are, that is very certain; he knows there are a great number there.

Now, I have said that you can make a draft, or that a draft can be made, from this particular herd of 100,000. Now, the evidence of that is this. The Russians discovered those Islands in 1786 or 1787. They did not know, or, if they did know, paid no attention to, the laws of nature in reference to the increase of these animals or the decrease of them; and they made indiscriminate drafts upon them, taking both males and females, and governed, probably, by the consideration of the state of the market, — how many the market would take profitably. Of course, it would not do to throw a good many on the market; that would not be profitable. But this sort of indiscriminate attack upon them very soon greatly reduced the numbers of the herd. They then found themselves compelled to take notice of the fact that the animal was polygamous, and it was only by the exercise of care and attending to natural laws that they could preserve this valuable race. They then began to confine their drafts to young males; and, finally, established a system under which the draft was wholly limited to young males, and that system was fully and perfectly established somewhere about 1846.

The President. — That system was not established, then, under the first Russian ukase of 1799, or even during the greater part of the second Ukase of 1821?

Mr Carter. — No, not perfectly established. It was not.

The President. — But it was established in the Russian times before the American possession?

Mr Carter. — Yes; fully established for 20 years before the Americans took possession of it. They then confined their drafts to young males in various numbers ranging from 30,000 to 40,000, or thereabouts.

The President. — And the females were never slaughtered even before pelagic sealing?

Mr Carter. — No; not after this system was established by Russia.

The President. — What, then, be came of those females?

Mr Carter. — Well, they lived their natural lives and died, subject to such attacks as were made upon them.

The President. — They were never taken, you mean?

Mr Carter. — They were never taken; but, of course, a female might be taken without damage if she had completed her period of reproductive usefulness and become barren. But that is a fact which cannot be ascertained, and so they were not taken. The drafts were confined to something like 30,000 to 40,000 under that system, taking from them no larger number than that. The numbers of the herd greatly increased; and towards the close of the Russian occupation the size of the drafts was increased to much over 30,000 or 40,000, sometimes going as high as 50,000 to 75,000.

Senator Morgan. — Were those drafts on the herd always regulated by the Russian Government before the United States got possession of it?

Mr Carter. — They were regulated by the company that had control of the islands. They fixed on an annual amount to be taken each year, and directed the slaughter to be confined to that number.

Senator Morgan. — By authority?

Mr Carter. — By authority ot the company, not by the authority of the Russian Government, as far as I am aware.

Senator Morgan. — Well, it operated as a rule of action.

Mr Carter. — Yes; a perfect rule of action to those on the islands, certainly.

Towards the close of the Russian occupation, as I have said, larger drafts were made from 50,000 to 75,000, and yet, notwithstanding those, at the time the islands passed into the possession of the United States, in 1867, the herds were probably larger than they had been before, during a knowledge of them by man. So that it is easily inferrable from this that a larger draft, even, than a number varying from 50,000 to 75,000 annually, might be taken. When they passed into the control of the United States, and during the year 1868, there was no regular authority established upon the islands, and consequently the islands were open to predatory incursions of all sorts, and expeditions went there and made raids upon the islands, if raids they could be called. There was nobody there to prevent their going, and they took an enormous number.

The President. — The Russian lessees had no more power.

Mr Carter. — The Russians had no authority to prevent it, and the United States had, as yet, established no authority.

The President. — Was the Russian Company dissolved.

Mr Carter. — No, but it had no longer any title to the breeding places.

The President. — And there was no new American Company formed

Mr Carter. — No, no new American Company was formed, and the

United States Government had established no authority. There was a period of lawlessness there. Anybody could do as he pleased. There was a sort of interregnum, so to speak. That was availed of by many persons, who made an indiscriminate attack, or, to some extent, an indiscriminate attack upon the seals. They took in numbers, in that year, about 240 000.

Mr Justice Harlan. — What year was that?

Mr Carter. — 1868. They tried to confine themselves, even then, to the taking of males; and they were aided, in that effort, and greatly aided, in that effort, and the seals were greatly spared, by the great natural aversion which the natives, who did the driving, had acquired against killing a female. The establishment of the system, its long maintenance upon the island, of saving the females, and its obvious benefits and utility — its manifest necessity to a preservation of the herd — the natives had become so habituated to that they had acquired an aversion to killing females, and that aversion had a beneficial effect, even during this period of unregulated capture. Still, it is not improbable, and there is some evidence to show that there were, perhaps, 30 000 or 40 000 females taken at that time. Subsequently to that the United States established its authority, leased the property to a Company by a lease, one of the regulations of which gave the United States power to control the numbers that should be taken annually, and under that the lessees, from the first, began to take 100 000 young males a year.

The President. — Can the Government fix the number every year?

Mr Carter. — Every year.

The President. — And alter the number every year?

Mr Carter. — And alter the number every year.

The President. — Without an indemnity to the Company.

Mr Carter. — Absolutely at its own pleasure, and it has agents there for the purpose of observing the condition of the herd, in order to enable it to exercise that discretion the more wisely.

I may further, in reference to the slaughter of females and with reference to the protection against it, say that the United States, upon acquiring the sovereignty over the islands, passed laws making it a penal offence to kill any female — it is a penal offence to kill any seal at all without this authority, but a penal offence to kill any female under any circumstances.

The President. — Is that in the concession to the lessee — is it written down in the grant that they are not to kill females.

Mr Carter. — I will not say.

The President. — Since no other person has authority to kill a seal, and there are laws against sealing, if the only ones who have authority to kill a seal are the Company, then the Company must be interdicted killing females.

Mr Carter. — It is interdicted by the law. There is a statute of the United States which binds even the action of the Executive Government. The Excutive Government of the United States could not give authority to kill female seal. It is a crime.

Mr Justice Harlan. — Some of the Arbitrators wish to know whether the concession granted to this Company was granted by the Executive Department, under the authority of an Act of Congress.

Mr Carter. — It was. There was a special Act of Congress providing that the islands might be le ased out, and a provision made for putting the privilege up to auction, and obtaining the highest bidder. The lease was executed in pursuance of those provisions.

Mr Phelps. — There was a royalty reserved.

Mr Carter. — Yes. The Government was compensated in two forms; first, by a lump sum paid annually, and then by a royalty upon each seal killed.

Lord Hannen. — It was only the source of the lease that we wanted to get at, whether it was under the direct power of an Act of Parliament, or whether it was done by the Executive.

Mr Carter. — Done by the Executive Department of the Government under the authority and in the discharge of its duty imposed upon it by the Act of Congress.

The President. — By a special Act of Congress?

Mr Carter. — By a special Act of Congress.

The President. — A special Act made for that, not for this Company, but for the fact of leasing?

Mr Carter. — Yes.

Mr Justice Harlan. — It is the Act of the 1st of July, 1870, page 93 of volume I of the appendix.

The President. — The fact of leasing to such Company was the mere action of the Executive?

Mr Carter. — Yes, under the authority of the Act of Congress.

(The Tribunal then adjourned for a short time.)

The President. — Mr Carter, we are ready to hear you.

Mr Carter. — When the Tribunal rose for its recess, I was stating that, as a matter of fact it was possible to take 100000 young males from the herd without diminishing its normal numbers.

Mr Justice Harlan. — Are you speaking of that which is done now, or in the past?

Mr Carter. — I was taking this herd at its maximum amount. That is, I assume, if man withholds his hands, the size of the herd will reach a certain maximum beyond which it will not go. If left to natural causes, exclusive of the operation of man, the size of the herd will reach a natural maximum, and that beyond that it will not go. At that maximum, if man interferes and confines his draft of them to young males, he will take 100 000 annually without diminishing the normal numbers of the herd. The first drafts, of course, will diminish the numbers by the

number that is taken; but, after the first year or two, it will then remain the same.

I had stated, as supporting that view, that drafts to the extent of 50 000 to 75 000 had been taken under the Russian Government, and that the size of the herd had increased from a depressed condition into which it had been thrown, it had increased under that draft. So that at the time when it passed into the American occupation, its numbers were as large, if not larger, than they had ever been known to be. I had spoken of the irregular and indiscriminate draft in 1868 of 240 000 in one year; that then, when the United States came into possession, its lessees began by taking 100 000 in 1869, or rather the lessees took for the first time in 1871. In 1871 they took this draft of 100 000 annually. They continued to take that draft of 100 000 annually till 1887, a period of 17 years; and it was not until 1884 that any perceptible diminution in the size of the herd was observed.

Now, let us see what fortunes the herd had been subjected to in the course of that period of 17 years; and that introduces me to the subject of pelagic sealing and the attack which it has made upon it. If the members of the Tribunal will turn to page 366 of the case of the United States, they will see there the commencement of another kind of attack by the hand of man; and that is by pelagic sealing. That practice of pelagic sealing began in 1872. In speaking of pelagic sealing, I do not mean that pelagic sealing which had been carried on always by the Indians on the coast, — I class that kind of pelagic sealing with the causes of diminution which proceed, like natural enemies, from causes other than the hand of man. It had assumed the normal maximum with that element of diminution prior to the time which I have taken into consideration.

Now, in 1872 this practice of pelagic sealing by vessels fitted out for that purpose began. The capture in the first year was small, — 1000 skins and something over.

General Foster. — In the North Pacific Ocean.

Mr Carter. — I know they were ten years in the North Pacific; but, still, it is a diminution of this herd, just as much as if that had taken place in the Behring Sea.

Now in 1873 the amount of the catch is not given.

In 1874 it increased to nearly 5 000.

In 1875 it went down again to 1 646.

In 1876 it rose to 2 042.

In 1877 to 5 700.

In 1878 to 9 593.

In 1879 to 12 500.

In 1880 to 13 600.

In 1881 to 13 541.

In 1882 to 17 700.

In 1883 to 9 195. That is a reduction again.

In 1884 to 14 000.

In 1885 to 13 000.

In 1886 to 38 907.

In 1887 to 33 800, and the increase after that was still more rapid.

Now during a period of more than 10 years, this draft of 100,000 by the United States of young males was made upon this herd without substantial diminution of its numbers. Now the contrary of that will be asserted — at least that proposition that I am stating will not be admitted to the extent to which I have stated it here. So far as the evidence is disputed on that subject it will be dealt with by Mr Coudert. I have not the time to go through the evidence, but nevertheless I shall state the main grounds upon which we proceed.

The evidence shewing, as the United States contend, that up to the year 1884 there was no substantial or perceptible diminution of the numbers, is derived from the evidence of persons who were on the islands, and who knew what the facts were. There is no evidence to the contrary substantially contradicting that.

There are some vague and untrustworthy conjectures that a diminution had been observed prior to that time; but the substantial evidence, I think I am well justified in assuming, confirms the position which I now take, and which is, that for a period of 10 years, and more, this draught of 100,000 young males was taken by the United States from this herd without any substantial diminution of its numbers. At that time, 1884, it will be seen that pelagic sealing had assumed large proportions — the numbers taken in 1884 amounting to 14,000; in 1885 to 13,000; and, as I shall presently show to the Arbitrators, that entire number consisted substantially — probably fully — of females, and of course the taking of such a number of females from the herd, operating at once upon the birthrate, was a factor of a most important character. We do not pretend that the the United States can continue to take 100,000 young males from that herd if pelagic sealing is permitted. It is perfectly certain that it cannot. If pelagic sealing is carried to any great proportions such as taking 5,000 or 10,000, annually, it would be perfectly impossible for the United States to take the number of 100,000 young males — there is no doubt about that. My statement — my assertion — is that if all other attacks by man — and if pelagic sealing — is prohibited, it is possible for the United States to take 100,000 young males without any diminution of the normal number of the herd; and experience proves it.

They did it for 10 years and upwards without any diminution in the normal number of the herd. After 1884, or after a little later — in 1887 — there began to be found a difficulty in finding this 100,000 young males. They were not easily discoverable. Drives had to be made there more frequently in order to gain that number, and a difficulty was experienced in getting it.

Prior to that time, the draft of 100.000 young males was easy, and still left very large numbers of the same class untouched; but when

the ravages of pelagic sealing began, then the birth-rate being diminished the numbers of those young males were diminished correspondingly, and then it became difficult to find these 100.000 young males. Still it was done; the drafts were continued. They ought not to have been, but they were continued until the year 1889, when, in consequence of the difficulty, and o the certainty which had then become manifest, that too much of a draft was being taken from the herd, the taking was stopped when the number of 23,000 I think — no, that was in 1890 — the taking was stopped when the number of 23,000 had been reached.

Senator Morgan. — Who stopped it?

Mr Carter. — The authorities, the people upon the island.

Senator Morgan. — By the order of the Secretary of the Treasury?

Mr Carter. — By the order of the Government Agent on the island, overseeing—having charge of the interests of the United States on the island; and being clothed with the discretionary power that the United States retained under the leases, of diminishing the number whenever, in his judgment, it was thought to be necessary; the time had arrived when he thought it would be necessary to take a smaller number, and he stopped the killing absolutely when 23.000, or so, had been reached.

Senator Morgan. — Was that in 1889 or 1890?

Mr Carter. — In 1890. I thought in the first place it was 1889, but during the three years preceding that time there had been more and more difficulty in easily finding a hundred thousand young males to be taken. If, at that time, due consideration had been given to the subject of pelagic sealing — due account taken of the enormous ravages which it was making upon the trade, it would have been the part of prudence to have stopped at that time. But the subject was new. The practice of pelagic sealing was comparatively new, and it did not challenge closely the attention of either the lessees of the islands or the Government until it had reached considerable proportions. And let me say also that it was not until the year 1883 that any pelagic sealers had ventured into Behring Sea; the drafts made by the pelagic sealers prior to that time had been made in the North Pacific Ocean alone, south of the Aleutian islands. In 1883, however, a single vessel entered Behring sea. She was successful there, and that success prompted similar efforts, and in subsequent years the practice of entering Behring Sea greatly increased. But from what I have said, I think is quite clear that it is possible, if pelagic sealing were prohibited, to take 100,000 young males anually. What I mean by that is, that the regular normal increase of that herd which is applicable to the uses of mankind, and which can be taken without diminishing the stock, amounts, we may say, to 100,000 young males annually. It may go something beyond that, but as far as the evidence goes, I think that figure is substantially correct. I rather think that a larger draft than that could have been made; but the evidence goes to show, at least, that that draft could.

Fifth. Omitting from view as being inconsiderable, such killing of seals as is carried on by Indians in small boats from the shore, there are two forms of capture at present pursued : that carried on under the authority of the United States upon the Pribilof islands, and that carried on at sea by vessels with boats and other appliances.

Sixth. The killing at the Pribilof Islands if confined, as is entirely practicable, to a properly restricted number of non-breeding males, and if pelagic sealing is prohibited, does not involve any danger of the extermination of the herd or of appreciable diminution in its normal numbers. It is far less expensive than any other mode of slaughter, and furnishes the skins to the markets of the world in the best condition.

That fact is incontestable. The expense of killing seals where they come upon the land and where they may be killed at the rate of thousands in a single day, must be far less than that carried on by means of fitting out vessels and sending them with boats and appliances on different voyages.

And furnishes the skins to the markets of the would in the best condition.

That is fully substantiated by the high prices which, in the market, the skins of seals killed on the Pribilof Islands bear. — This difference is very substantial.

The killing at these Islands since the occupation by the United States has been restricted in the manner above indicated.

That is by the killing of a certain number of non-breeding males.

It has been the constant endeavour of the United States to carefully cherish the seals and to make no draft except from the normal and regular increase of the herd. If there has at any time been any failure in carrying out such intention, it has been from some failure to carry out instructions or want of knowledge respecting the condition of the herd.

The United States are under the unopposed influence of the strongest motive, that of self interest, 'to so deal wuh the herd as to maintain its numbers at the highest possible point. The annual draft made at the islands since the occupation of the United States has been until a recent period 100,000. This draft would be in no way excessive were it the only one made upon the herd by man.

Now I have said that if the killing by the United States has not been confined to this number which is consistent with the preservation of the herd, it has been from some failure to carry out instructions upon the island or from some want of knowledge in respect of the actual condition of the herd. The United States, and its lessees as well, are under the influence of the strongest possible motive to prevent any diminution of the number of the herd. Of course, it is only the plainest of fools that kills the goose that lays the golden eggs. Here is a property of prodigious value; the annual income derivable from it is very large. That annual income can be made permanent only upon the condition that the normal numbers of the herd are retained. It is to the interest therefore of the United States to prevent, at all times, any danger to those numbers beyond that which they can, with perfeet safety, sustain. Self intertes is surely a strong enongh motive as to that. It is that inte-

rest which operates everywhere upon men and induces caution every where; and of course it is a more powerful incentive to caution than any provisions which laws could make; and what is the interest of the United States is the interests of the lessees as well. The Uuited States has adopted the policy wisely of leasing out these lands on long leases of 20 years. The lessees agree to pay a large lump sum annually for that lease. Of course it is in a high degree their interest that the herd should be maintained at its highest possible numbers. The pursuit of any other policy would be ruinous to them. They also are under the unopposed influence of the strongest motive which can operate upon men that of self interest.

Seventh. Pelagic sealing has three inseparable incidents.

1. The killing cannot be confined to males; and such are the greater facilites for taking females that they comprise three-fourths of the whole catch.

2. Many seals are killed or fatally wonnded, which are not recovered. At least one-fourth as many as are recovered are thus lost.

3. A large proportion of the females killed are either heavy with young, or have nursing pups on the shore. The evidence upon these points is fully discussed in Appendix.

Now in pelagic sealing, with its inseparable incidents in the catch, there can be no discrimination exercised. Every seal is killed that can be found. No distinction of sex can be ascertained. All that is conceded; and, in point of fact, the amount of the catch is, as we maintain fully three-fouths females.

Now the evidence upon that point, and the conflicting evidence upon that point, will be more fully discussed by my brother Coudert; I have time only to call the attention of the members of the Tribunal to its leadnig features. In the first place, what should we suppose to be true from the probabilities of the case? Here is a herd which consists, from the fact of its highly polygamous character, and from the fact that one male suffices for anywhere from twenty to forty or fifty females, and from the fact that for a long series of years there has been a large annual draft on the islands from the males alone, the condition in which the herd is found is one where the females greatly outnumber the males — three or four to one, probably, at least; therefore in the ordinary course of things the catch of females ought to outnumber the males, three or four to one.

In the next place, during a very considerable portion of time which is occupied by pelagic sealing — that is, while the seals are on their northerly migration -- the females are heavy with young, more easily approached, and more easily killed. Then what is the evidence upon the subject? The evidence given on our side by a multitude of depositions, to which I cannot refer because I have not time, and have not embraced that as the part of the subject with which I was to deal — but the general purport of the evidence which it all tends to prove, is, that the catch of females is as much as 80 for 90 per cent of the whole catch. That is

derived from individuals who are engaged in pelagic sealing, and who say that that is the amount of the catch.

In the next place, we have the evidence of the Furriers who handle the skins, and who know perfectly well — can tell by a glance — the difference between the skin of a female. They handle the whole catch, the pelagic catch, and the catch on the islands; and in this pelagic catch their evidence tends to shew, and does shew, that the proportion of females is very much greater than 75 per cent.

Then we have a very large amount of conflicting affidavits; our affidavits, (the affidavits used by the United States), making the amount 70 or 80 per cent — and then a great many affidavits introduced into the case by Great Britain. These latter, somewhere, place the number of females at all proportions. I might briefly allude to that, for I ran over these affidavits to see.

There were 26 witnesses whose depositions were given on the part of Great Britain, all of whom, stated that the catch of females was larger than that of males; and of those 26 witnesses, 19 agree that the proportion that the females bore to the whole catch, was 60 per cent — one witness placing it as high as 80 per cent of the whole catch.

There were 35 witnesses who said that the number of males and females were about alike. There were 38 who stated that there were more males than females taken, stating it generally in that way; and then there were 30 who stated that there were sometimes more females and sometimes more males taken. There were, as I have already said, 19 witnesses testifying that over 60 per cent of females were taken.

Now, putting that all together, it does not tend to displace even the conclusion established on the part of the United States, especially including that of the furriers, fortified as it is by the probabilities of the case, that at least 75 per cent of the pelagic catch is composed of females.

In the next place, there are in pelagic sealing (and, of course, it must be so) a great many fatally wounded who are not recovered. Now, the general purport of the evidence (I cannot discuss it, or state its details) is to the effect that at least one-quarter of the number of seals that are wounded and who are eventually killed — that one-quarter of the number struck are wounded, at least, without being recovered. The other fact which I have stated as an inseparable feature is that a large proportion of the females that are killed are either heavy with young or nursing-females. Those that are killed on their migrations north to the Pribilof islands are, of course, heavy with young because the birth takes place in a day or two always after they land. They appear to land only when the exigency is forced upon the female of giving birth. So that they are heavy with young; and the affidavits here will, when the members of the Tribunal come to read them, give sickening details, which I do not propose to dwell upon now, respecting this killing of females heavy with young. They are skinned upon the decks of the vessels immediately,

and the young drop out bleeding, bleating and crying upon the decks of the vessels, and remain in that condition, — sometimes they are kept there in that condition for days. Then, after they have given birth to their young on the islands, the females require to go out to sea for the purpose of procuring food in order to sustain their young; and they go long distances. No one knows just how far; but distances as great, probably, as 150 miles. They have been found and killed at such distances as that from the islands when the breasts showed that they were nursing-females when on shore. The details, again, are very horrible and sickening there of killing these animals, mammalia with breasts, and milk and blood flowing on the decks of the vessels. Incidents like those serve to give a sort of horror to the practice; but I do not dwell upon them here, because I am only giving before the Tribunal those material facts which I shall bring to bear on this question of property.

Now this recital of the principal facts which it is needful to take into consideration in considering the question of property embraces these features which I think are placed quite beyond any contradiction by the evidence. *One.* That the seal is a mammal, highly polygamous, but producing one only at a birth; its rate of increase, therefore, is exceedingly slow. *Two.* It is defenceless against attack on land and easily captured at sea. *Three.* The present attack upon it is not by a few barbarians as in former times; but it is by the whole world, and that attack is stimulated by the very high profit which may be gained from any successful venture in taking seals. *Four.* The race may be exterminated by man upon either land or sea.

Now, as to the land. Of course, it is admitted that they can be exterminated by the United States almost at one blow. The seals are on these islands, absolutely within the power of man for the period of 5 to 6 months every year, and they could all be killed, and if any victims remain after an indiscriminate slaughter of one year, why they could be slaughtered in the next, and it would take but two or three short years absolutely to exterminate that animal as a commercial fact. A few scattered individuals might undoubtedly remain, but they would amount to nothing. Nobody would pursue them, and so far as they constitute an ingredient in the commerce of the world, and so far as they constitute a bounty of nature useful to man, they could be absolutely exterminated in two or three years if the United States chose to do so by an exercise of their power on these islands. They can also be exterminated by pursuit at sea. That may not be admitted on the other side; but the Members of the Tribunal will see that that fact is absolutely beyond dispute. Why, the Counsel for Great Britain put themselves in the position that this herd will not stand a draft of 100,000 young males even, that a draft of that character is destructive to it. Now, we do not think so. We think it will stand that. Of course, there is, as I have already said, a certain number of young males which may be taken without injury to the herd. We think it ranges as high as 100,000. We agree, of course,

that if you go beyond a certain number of young males you do begin to destroy the herd, because you do not have enough to answer the purposes of reproduction. You must have sufficient males for that purpose. Our position is that that number is as high as 100,000; but the position on the part of Great Britain is that that is too great a draft, — that it will not stand 100,000; and they offer what they conceive to be evidence tending to show that it will not stand that draft. They point to the limited drafts which Russia made on the herd while the islands were in her occupation, and say that Russia was more prudent in this particular. They [there think that they find somewhere in the evidence in this case circumstances tending to show that that herd began to be diminished before pelagic sealing was introduced. That means, of course, that, according to them, the herd will not stand a draft of 100,000 young males annually. If it will not stand the draft of 100,000 young males annually, what draft of females will it stand? Why, under pelagic sealing that has already reached a figure between 60,000 and 70,000 a year, and when we take into consideration the number that are killed but not recovered, we must consider that the whole of that 60,000 represents females.

The President. — Have you any average of the number killed by American fishermen.

Mr Carter. — This is all included.

The President. — It was not included in the number you gave us, was it?

Mr Carter. — Yes.

The President. — No, not in the table.

Mr Justice Harlan. — You will see otherwise in the note at the bottom of the page, I think.

Mr Carter. — I thought that the evidence we had on both sides embraced both. In page 207 of the Report of the British Commissioners will be found such evidence as we had in the case showing the catch of the United States vessels. I thought that was included in the pelagic catch which I have read from the tables, but I am corrected in that particular and find that it does not; and so this table from which I read must be increased by adding to it the amount of the American catch, whatever it may be, in order to give the true figure. In reference to the American catch, the materials for ascertaining it and getting hold of the real amount are very imperfect, and they cannot be relied upon.

Sir Charles Russell. — I think the figures at page 207 of the British Commissioners Report include all that are caught by pelagic sealers.

Mr Carter. — It includes their computation of all.

Sir Charles Russell. — Yes.

Mr Carter. — There is a difference, however, between the American Report and the British Report as to the amount of pelagic catch of Canadian sealers.

Sir Charles Russell. — It purports to include all.

Mr Carter. — It purports to include all.

Mr Justice Harlan. — The table you read shows 62,900 skins in 1891. The table in the British Report shows for the same year 68,000.

Mr Carter. — Yes, of course; there are discrepancies, but it is larger for that year. So far as those questions are material as to amounts, those details of the evidence will be dealt with by my brother Coudert when he comes to deal with the evidence ; but the point to which I wish to draw the attention of the Arbitrators here is this, that it is perfectly manifest that the race can be exterminated by pelagic sealing as well as sealing on the land. It may take longer to do it, but it can be done, because, if the herd will not stand a draft of 100,000 young males annually, surely it cannot stand a draft of 50,000 females annually or anything like it. It could not stand the killing of 5,000 females annually, because the killing of a female operates at once on the birth rate, and would do so from year to year. I think it would be demonstrable. I cannot go through it now, that on the assumption upon which my learned friends go, the herd will not stand a draft of 100,000 young males annually, that it will not stand a draft of 5,000 young females annually, and I say that this herd is capable of being exterminated from a commercial point of view as much by pursuit on the sea as by capture on the land.

Mr Justice Harlan. — What is the life of one of these seals?

Mr Carter. — Well, I believe their productive life is taken to be about 18 years.

Sir Charles Russell. — Where do you find that?

The President. — Of the female seals?

Mr Carter. — Of the female seals ; I think in the Report of the American Commissioners. That is their opinion based on their examination.

The President. — Then that would be an average of about fifteen young ones.

General Foster. — I think it is tiwelve to fourteen years.

Mr Justice Harlan. — My recollection of the evidence is that the average life is put down at fifteen years — the entire life.

The President. — Then that would be ten or a dozen young ones each on an average.

Mr Carter. — I suppose so, yes.

Now let me call the attention of the members of the Tribunal to the striking difference between dealing with a herd of fur seals like this, in the point of keeping up their numbers, and dealing with polygamous domestic animals. If you take polygamous domestic animals of any sort, sheep, horses, cattle, fowls, they can be raised all over the surface of the globe. There is hardly a spot on the globe where they cannot be successfully produced. If there is a great demand for them in the market, that stimulates their production; and immediately there is a saving of the females for the purpose of increasing the production; and the numbers that are taken for the purposes of the market will be taken from the

males. The consequence is there is an immense increase in the numbers, and that increase can be carried on indefinitely; and, of course, the market is soon glutted. It ceases to be an object to increase the numbers of them and rather the object is to decrease the numbers; so that, in the case of domestic animals, you may kill females without any difficulty whatever, whenever the condition of the market demands it, or makes it such as to be profitable to do so, and human cupidity is stimulated. They are increased, and will be continued to be increased until it ceases to be a profit to raise them. So that there need be no rules or precautions with regard to the killing of females in regard to the ordinary polygamous domestic animals, because they can be multiplied to an extent that is perfectly indefinite; and that multiplication will be produced whenever it is to the profit of the raisers of them to produce them.

With these animals however the case is very different. There are only four places on the globe where this particular species is produced, and the demand far exceeds the supply, and, of course, the idea necessarily is not only to preserve the present normal numbers but increase them if you can. But you cannot increase them beyond a certain point. You cannot do anything beyond saving all the females you have got; that is the utmost, and beyond that you cannot move a step. But you can keep up to that point and every motive and every reason in the world connected with the preservation of the numbers of the herd unite to condemn the slaughter of any single female unless she is barren. You cannot kill one of them without diminishing, *pro tanto*, the numbers of the herd, and those are the narrow conditions in which you are confined in reference to this particular animal owing to the circumstance that there are but four places in the habitable globe where it can be produced. You have to accept the conditions that nature offers you and content yourself with them, and make the most you can out of them.

Now, having shown the difference between these animals and ordinary domestic animals of a polygamous character, let me point out the difference between these animals and wild animals, notoriously wild, such as the birds of the air, wild ducks, or the fishes of the sea, such as the mackerel, the herring, the menhaden and all those fishes which constitute food for man, or which men use for other purposes and upon which he makes prodigious attacks.

There you cannot confine yourself to the annual increase, because you don't know it, and you cannot separate it from the stock. You cannot tell males from females; you do not know whether there are any more males than females and there is no reason why, in making your draughts upon such animals as that, that you should make your draughts from males rather than females. You know of no reason and, therefore, there is no kind of husbandry that can be practised with reference to the wild animals of the description I have mentioned. That is one of the distinguishing features between this particular wild animal, the seal, and other wild animals over which man has no control. With the seal, if man

does his duty and accomodates himself to the laws of nature and obeys the laws of nature he can practise a husbandry and obtain the whole benefit.

The animal is made capable of affording, without diminishing the stock, what he wants. With other wild animals, such as ducks, fish, and wild game, he can practise no such husbandry at all.

Here it will be observed how nature seems to take notice of the impotence of man and furnish remedies that he is incapable of applying.

In the case of the animals of which I spoke, nature furnishes a means of perpetuating their species in two directions. In the first place in the prodigious numbers which are produced. Take the herring, the mackerel, the menhaden or cod. They do not produce one at a birth, but one million. They produce enough not only to supply all the wants of man, but all the wants of perhaps one hundred other races of fishes that feed upon them. They inhabit the illimitable spaces of the sea. Their numbers are illimitable· Their sources of food are illimitable, and their reproductive powers are illimitable also; and, therefore, man may [invade them as he pleases, and make such drafts upon them as he pleases; but he does not approach any destruction of them.

There is another mode in which nature remedies and supplies the impotence of man to preserve these animals, and that is the facility she gives them for escaping capture.

Take the fish of the sea, or the birds of the air. They can escape. Man cannot take them at his will. Sometimes they may come within the range of his destructive capacity, but the great body of them do not.

With the seals it is otherwise. The have no defence. They are obliged, by the necessities of their nature, to spend at least five mouths of every year within the power of man, where he can slaughter them directly, if he chooses, and while at sea, even, they cannot escape the pursuit of man, as the evidence distinctly proves.

Now the distinctions between the domestic tribes of polygamous animals, and the distinction, between the other wild animals are extremely important to be observed, and all bearing on this questions of property.

Senator Morgan. — Do you remember any other fur-bearing animal besides the fur-seal or the rabbit which is susceptible of this husbandry of which you speak.

Mr Carter. — I do not know of any. I hear voices which I suppose are those of my learned friends referring to the sea-otter, but you cannot practise any husbandry with reference to the sea-otter. He never puts himself within the power of man; he escapes him and he evades him. It is the hardest thing in the world to get him, and there is an increasing difficulty in doing to from year to year; yet such is the value of the sea-otter, that man has already almost exterminated that animal.

The President. — Do you refer to the sea-otter fisheries which were provided for in the treaties on the same lines as the fur-seal fisheries.

Mr Carter. — They are protected by the laws of the United States in

the same way. They were part of the fisheries which constituted the wealth of these northern seas originally. The were at an early period almost the principal element in point of value in these fisheries; and the sea-otter was originally of more consequence to Russia than the fur-seal by far. Even when his number was considerably less, the value attached to his skin was very great; but as the numbers of the seals increased, and those of the sea-otter diminished, then the seal as a race far out-stripped the sea-otter.

The President. — I mean you do not put them upon the same line.

Mr Carter. — No, I do not. Man has no means of preserving the sea-otter, as far as I know.

He is either to abstain from the use of the animal altogether, or else, perhaps, submit to his extermination; and that is the case with some animals which you cannot protect. Take the canvasback duck of America. That is a very valuable bird, a very abundant bird, it was as long as a small attack was made on its number. 50 years ago, before there were any railroads and the means of transporting the canvasback duck after he was killed were small, the draft made on his numbers was very small, and confined to the localities where he was found. Consequently, the canvasback duck was extremely abundant. But now he can be transported 5,000 miles without injury; and, therefore, he is offered to the whole world and furnishes the banquets of the whole world. The whole world makes its attack upon the bird. There are laws which endeavour to protect him to a certain degree, but they cannot protect him against the cupidity aroused by such a demand; and, therefore, he is rapidly disappearing. There are some animals so valuable, and the demand for them so great, and the means of protecting them so little, that you must either give up the pursuit of them altogether, or consent to their practical extermination.

In other words, they have all the characteristics of wild animals, and none of the characteristics of tame animals. You cannot practise any husbandry in regard to them. No man, and no nation, can say to the rest of the world that he or it has a mode of dealing with them which will enable him to take the annual increase whithout destroying the stock. I shall make use of that hereafter, and you see now the important bearing that it has upon it. No ma nand no nation can say with regard to the principal races of fish in the sea that they can protect them if they are in danger of destruction. They cannot say that we can enforce by our power a limitation of the annual draft to the annual increase. There may be some fish as to which that may be perhaps said, and when more accurate knowledge is had of the habits of fish it may come to be ascertained that the inhabitants of some shores can protect some races of fish which resort to them, provided other persons are required to keep their hands off.

The President. — And that would give a right of appropriation in your view ?

Mr Carter. — Yes. That would immediately tend that way, — yes, directly, — it would tend in that direction whenever that power exists. That would be the tendency of my argument, and I am glad to see that the learned President grasps it.

The consequence of these facts is that the fur-seal cannot maintain itself against unrestricted human attack. It cannot do it. That is admitted here. We have a joint report by all these Commissioners which is to the effect that the fur-seal is at present in the process of extermination, and that is in consequence of the hand of man. The treaty itself under which you are sitting admits the necessity of regulations designed to prevent extermination. The cause of this diminution the grounds and reasons which are working the extermination of the seal are disputed between us. My learned friends upon the other side say it is this catching, this taking of the seals on the islands that is causing it. We say it is the pursuit of them by pelagic sealers; but whatever the causes there is no dispute between us as to the fact. These seals are being exterminated, and that means that the race cannot maintain themselves against the hand of man unless the assaults of man are in some manner restricted and regulated. As I have already shown that consequence of the inability of the race to maintain itself is inseparable from the killing of females. That race cannot maintain itself unless the slaughter of females is prohibited. It is a mammal producing one at a birth. The rate of increase is extremely slight and that increase can be cut down by a very small annual killing of the mothers from which the offspring is produced. This inability of the race, this infirmity of the race to hold its own in presence of the enormous temptation to this slaughter which is held out to man is inseparable from the slaughter of females. The killing of males if it were excessive would produce the same effect. No doubt about that. We do not dispute or deny that. All we say is that you can carry the killing of males to a certain point without any injury whatever.

The President. — Mr Carter, may I beg to ask you a question?

Mr Carter. — Certainly.

The President. — The American Company, the lessees of the Pribilof Islands, consider the fur-seals as their property or the property which they are to dispose of according to the grant by the United States. If they consider that they have a direct right to these animals, do you not think they have reason to complain that the United States allow pelagic fishing by some of their fishermen on the American coasts, and can you state, as a matter of fact, whether the Company or the lessees have applied to the United States Government to make an enactment to prevent that fishing, that pelagic sealing, according to the right which has been given to them? If I understand well your purport, and if your purport is the same as the lessees of the American Company, it is an injury to them that pelagic sealing should be carried on and practical destruction of female seals be carried on by American fishermen. Do you not think

that they have a right to complain, and I inquire whether they ever did complain to the American Government since 1884, for instance, which is the date you state as being the initial date when they began to perceive that pelagic sealing was offensive to their rights.

Mr Carter. — I think the lessees of the islands would have a moral right to complain to the United States if the United States, having leased these islands to then under certain conditions allowed their own citizens to carry on pelagic sealing or any other form of destruction. They would have a moral right undoubtedly to complain and a very strong equity to complain; but under the circumstances they have not, for the very first thing the United States Government did was to pass laws against it.

The President. — On the islands?

Mr Carter. — Oh no; on waters as well.

The President. — In the adjacent waters. It did not pass laws against American fishermen doing it elsewhere?

Mr Carter. — But the United States Government exercised all the power which Congress at the time supposed it had to prevent pelagic sealing. It supposed that in prohibiting pelagic sealing over the waters of Alaska — that is the phrase used — it embraced all those waters which it had acquired from Russia by the cession. The western boundary was that line which is seen drawn down there (indicating on map).

The President. — That is not the question.

Mr Carter. — They assume that " all the waters of Alaska " embrace all that portion of the Behring Sea and that therefore their enactments prohibit pelagic sealing over all those waters; and the United States Executive Government has so considered those enactments. It does seize whenever it can, and exercises its utmost diligence in seizing any American vessel caught anywhere in these waters engaged in pelagic sealing.

Mr Foster. — And always condemns them.

The President. — That is not quite my question. My question is: Do the American Company contend, as I understand you to contend, that the owners whoever they be, of the Pribilof herd, have a right of property or protection in these animals wherever they be; and if they have the right of property and protection, have they any legal right as well as a moral right to complain of the United States not punishing pelagic sealing anywhere else wherever the seals may go; for if I understand your purport they have a right of property or protection anywhere, — not only in Alaskan waters.

Mr Carter. — I agree to your suggestion that the lessees of these islands would have a moral right.

The President. — No; I ask you whether they have a legal right?

Mr Carter. — Not quite a legal right perhaps because at the time when their lease was executed and their rights were acquired, it might be said to be the fair interpretation of that document that they took their right to the fur-seals here subject to the existing condition of

things and that if there is any failure on the part of the lessor to repress pelagic sealing they took it subject to that failure. I should, therefore, not consider that they have what is called a legal right; but I should think at the same time they had a moral ground to say to the United States : " You are the owners of this herd and being the owners of the herd and being a nation you have a right to protect them wherever that herd goes. Having that right and having let the opportunity of taking these seals on the Pribilof islands to us we think that you are bound — bound in the exercise of your just powers — to repress this pelagic sealing. " I think they would have a right to insist upon that.

The President. — I would call that a legal right.

Mr Carter. — No; I do not quite call it amounting to a perfect legal right because it might be said to these people : " No, we have never undertaken to protect this herd everywhere on the seas. We executed to you this lease. You knew what the laws were. You knew what protection you would get. You did not ask for anything more. Having accepted your lease under those circumstances you must be content with it.

The President. — In fact they have not asked for any more. They have not asked for an act of Congress, a statute against American pelagic sealing.

Mr Carter. — I cannot speak upon that point. I know of no evidence in the case.

Mr Phelps. — They have.

Senator Morgan. — I would like to say, Mr Carter, in that connection that the number of seals that are permitted to the lessees to be taken is regulated by the case and by the law. Under the lease of 1870 they were permitted to take not exceeding 100,000 seals annually which number might be reduced by the Government of the United States without any liability whatever for damages, according to their estimate and opinion as to what public policy required. Under the lease of 1890 they were allowed to take not exceeding 60 000 under the same conditions. So that whatever number the United States fixes annually, at any time of the year they choose to fix it, that is the number that they may take and is the number they have agreed to abide by. They have no right to any greater number than the United States chooses to award to them. Therefore they cannot have any interest direct or indirect in the question whether we are preserving the seal herds or not if they get their number.

The President. — They have no direct right under the average of the herd.

Senator Morgan. — Not at all, not the slightest.

Mr Carter. — I should still be disposed to agree with the suggestion of the learned President even under those suggestions.

Senator Morgan. — That there would be a moral right?

Mr Carter. — That there would be a moral right.

Senator Morgan. — I do not think so.

Mr Carter. — That there would be a moral right in the lessees to call upon the United States to exercise that authority to preserve this herd for they might argue : " If you did exercise that authority this herd would be in a condition in a few years to give us instead of 60,000 a hundred thousand. "

Senator Morgan. — If you will allow me, the Congress of the United States which has but recently adjourned has made a provision of law by which all of the statutes that now apply to the Behring Sea shall be extended in their full force over any area of waters that might be determined by this Tribunal as being within the prohibition or within the regulations which they have prescribed. The Congress of the United States have prepared in advance so as to extend their penal and other laws over the area that this Tribunal is to determine upon. It has done all that can be done under the circumstances.

Sir Charles Russell. — That was merely a provision to enable the United States to give legal effect to any regulations, if any, that should be enjoined by this Tribunal.

Senator Morgan. — That was in the hope of a proper adjustement of this question.

Mr Carter. — It was a looking forward on the part of the United States to a concurrence in any measures which this Tribunal might adopt which would insure the preservation of the fur-seal.

The President. — What I wanted to come to, if you will allow me to make my point a little more clear, is this : according to the 5th question of our article 6, we have to determine whether there is a right of property and protection in these seals. I think your contention is that there is a legal right of property and protection.

Mr Carter. — Yes; it is.

The President. — That is for the United States; but you do not admit of a legal right or a moral right for the lessees of the United States to claim the right of property and protection. I think what Mr Senator Morgan just explained accounts for that.

Mr Carter. — Yes.

The President. — I wanted to make the distinction clear.

Mr Carter. — Yes; I apprehend. If these islands were not in the possession of the United States Government, but were in the possession of private individuals, I think there would be a moral right on the part of those individuals to call upon the United States Government to exercise its powers on the high seas to prevent the destruction of those seals.

The President. — That is what the United States demand from us to-day?

Mr Carter. — It is what the United States demand from you to-day. It is what I am now endeavoring to show to this Tribunal. I am taking one step, and that is to say that the United States has a right of property there. My next step will be that having that right of property, they have a right to go there with force and protect it; and my next step will be that

if they have not the right to go there with force and protect it, you ought to pass some regulation giving them that right.

The President. — Then they do not protect their own property as yet against the pelagic sealing.

Mr Carter. — They do not protect their own property as yet, for the reason that they do not want to disturb the peace of the world.

The President. — Would it disturb the peace of the world if they were to act against their own citizens engaged in pelagic sealing?

Mr Carter. — No, not at all; and we continue to act against our own citizens.

The President. — No, you do not do that. You do not act against your own citizens everywhere.

Mr Carter. — So far as our Laws go.

The President. — I say your Laws do not go as far as your contention.

Mr Carter. — No; the Laws do not go as far as our contention goes. The Congress of the United States is a different body from the executive department of the United States. The executive department of the United States submits questions of law, takes its position, here. I am here for the purpose of arguing them. Perhaps the Congress of the United States might not have gone through all the processes of reasoning which I have gone through. They act upon their own views and upon their own conclusions. They have taken the ground and have evinced their intention of protecting these fur-seals, and protecting them for their own benefit, against the attacks of pelagic sealing, from whatever quarter — their own citizens or others. They may have understood that their powers were confined to Behring Sea, and therefore limited their jurisdiction to the Behring Sea. They may have acted upon that assumption — an erroneous one, in my judgment.

Mr Justice Harlan. — The President refers to the failure of Congress to enact a statute forbidding American citizens from taking seals on the North Pacific. Supposing that Congress could pass such a law, and did, what effect would that have upon the pelagic sealing, if the subjects of Canada were left at liberty to pursue it ?

The President. — That is another question.

Mr Carter. — It would tend, possibly, to diminish the attacks, to some extent; how much, would be a question. Of course, it might be argued by the Congress of the United States, it might be said by Congressmen, " if all the world is to be permitted to go up there and take the seals, we might as well let our own citizens go. We will not protect the seals against attacks by our own citizens if other people are to be allowed to attack them. "

The President. — You want to convince us first and the American Congress afterwards, while you ought to convince the American Congress first and us afterwards. That is what I mean. It is merely a point in my mind.

Mr Carter. — That the American Congress, after this Tribunal shall have established American rights, will hesitate at all in exercising the utmost degree of protection, is scarcely to be apprehended.

The President. — But it might have been in argument before us that the American Congress had already admitted the right.

Senator Morgan. — You will remember that Lord Salisbury, I think, or Lord Rosebery, in discussing the *modus vivendi* which is now governing this matter, made the objection that the British Government and the American Government would be tying their hands by agreeing upon the prohibition of pelagic sealing during the pendency of this litigation, and permitting other nations to come in and take the seals at their will. Both Governments had to take the risk of it.

Mr Carter. — Yes; that is undoubtedly true. But still the observation of the President is correct, namely, that if the United States had a property in these seals and a right to protect them upon its own possessions, it could at all times have prevented its own citizens from taking seals even in the Northern Pacific Ocean. It could have done that. It has not done it; and so far as that is an argument bearing upon the merits of this question of property, I must allow it to pass unanswered; but as to the force and weight of it, I must be permitted to say that it does not seem to be very significant.

The President. — It merely shows the question is a delicate and disputed one.

Mr Carter. — The policy of passing laws of that character, the direct operation of which would be, allowing that these pelagic sealers were mere marauders, to restrain your own marauders for the benefit of the marauders of another nation, is not a very obvious one.

There is one other fact perfectly indisputable in regard to pelagic sealing, and that is this : the moment its destructive effect reaches a point where the maintenance of the industry on the Pribilof islands ceases to be remunerative, that is, when it reaches that point where it is no longer worth while to maintain that establishment of two or three hundred Indians which are kept upon that island — then of course that industry must be given up; and when that industry is given up, that population must be withdrawn. They cannot live there without outside support. And then, of course, all protection to those islands against the marauding incursions of people who want to kill them upon the land is gone, and when that guard is withdrawn and all protection taken away, of course that herd of seals is exterminated. It is exterminated for the United States. It is exterminated for these lessees. They can no longer get anything out of it. It is exterminated for the whole world. It is exterminated even in respect to these pelagic sealers, for their occupation is gone also. They are all gone, in a common calamity, and gone very quickly, too, after the guard is withdrawn, and that will take place just as soon as it ceases to be profitable to maintain it there.

Now, there is a superfluity of young males newly born. That superfluity of young males can be taken upon the islands and the taking can be limited to that, provided all interference is prevented by sea, provided pelagic sealing is stopped. That fact, although it appears to be manifest upon the face of it, yet I do not wish to have any doubt upon that point-that there is a superfluity of young males. We say it amounts to 109 000; but whether it smounts to 50 000 or 100 000 or 200 000, there is a superfluity, and that superfluity can be separated and taken by the United States on those islands without injuring the stock. As I say, that seems to be self-evident, but I do not know that it will be admitted, and I choose to state one or two circumstances which prove it.

We have witnesses long resident upon the islands and in charge of this business, who swore to it; but it is proved by the overwhelming experience of one hundred years. It is proved by the fact that Russia, after her occupation of the islands, and while she did not confine her draft to this superfluity of males, adopted a course which tended towards the destruction of the herd and came very near to destroying it. It is proved by the fact that when she corrected her methods and confined her draft to this superfluity, in 1846, the herd continued to increase; so that when twenty years later it passed into the possession of the United States, it had reached as great a magnitude as it had ever had. It is proved, in the next place, by the experience of the United States during more than ten years of their occupation, and until the excessive drafts occasioned by the pelagic sealing made this draft of 100 000 males an undue draft upon the herd.

Therefore this statement is fully substantiated by the uniform experience on the islands--an experience extending over a period of one hundred years. It is substantially, I think, admitted by the British Commissioners themselves.

In Section 37, at page 7, of their report, they say:

> 37. During the early years of the Russian control, the conditions of seal life were very imperfectly understood, and but little regard was paid to the subject. A rapid diminution in the number of seals frequenting the islands, however, eventually claimed attention, and improvements of various kinds followed. Among the first of the more stringent measures adopted was the restriction of killing to males, which followed from the discovery that a much larger number of males were born than were actually required for service on the breeding "rookeries." The killing of females was practically forbidden on the Pribilof islands about 1847, and on the Commander Islands probably about the same date.

I pass to section 41;

> 41. It is also noteworthy, that for many years previous to the close of the Russian control (probably from about 1842) under a more enlightened system of management than that of the earlier years, the number of seals resorting to the islands was slowly increasing, and that the average number taken annually was gradually raised during these years from a very low figure to about 30 000, without apparently reversing this steady improvement in the numbers resorting to the islands.

I pass to section 116, on page 29 :

116. It is, moreover, equally clear, from the known facts, that efficient protection is much more easily afforded on the breeding islands than at sea. The control of the number of seals killed on shore might easily be made absolute, and, as the area of the breeding islands is small, it should not be difficult to completely safeguard these from raiding by outsiders and from other illegal acts.

And Section 327 on page 58 :

317. Thus, on the Pribylof Islands, one particular instance has been recorded, when, in consequence of the long persistence of field-ice about the islands, the seals were very greatly depleted. This occured in 1836, when, according to native count, the number of adult seals on St. Paul Island was reduced to about 4,000, and the greater part of the small number of seals killed in that year consisted of pups. Other, though less disastrous instances, of the same kind have occurred since, and a study of available information respecting the amount and position of the ice in Behring Sea in various years shows that such adverse conditions may recur in any year, though probably seldom with the same intensity as in 1836.

That serves to show from how low a point of numbers the seal herd on the island, under the practice of this limited draft of young males, increased to their subsequent magnitude.

I now read section 659, page 114 :

659. The system adopted for the regulation and working of the Pribylof Islands by the United States'Government, when its control had been established, and after the irregular and excessive killing which at first followed on the witdrawal of the Russian, authorities, was substantially that which had gradually been introduced by the Russians, as the result of their prolonged experience, but with one very important exception. This exception related to the number of seals allowed to be killed annually. The number was at this time suddenly and very largely increased, being in fact more than doubled, as is elsewhere pointed out in detail ; and which the experience of many former years showed that the Russian system, with a limited annual killing, might be maintained with a reasonable certainty of the continued well-being of the breeding grounds, it had in fact, according to the best available information, resulted in a gradual and nearly steady increase in number of seals. The much larger number permitted to be killed under the new regulations at once removed the new control into the region of experiment.

That shows that the former control, the Russian control, at least resulted in a steady but gradual increase in the number of seals.

I continue to read, section 660 :

660. Theoretically, and apart from this question of number and other matters incidental to the actual working of the methods employed, these were exceedingly proper and well conceived to insure a large continual annual output of skins from the breeding islands, always under the supposition that the lessees of these islands could have no competitors in the North Pacific. It was assumed that equal or proximately equal numbers of males and females were born, that these were subject to equal losses by death or accident, and that, in consequence of the polygamous habits of the fur-seals, a large number of males of any given merchantable age might be slaughtered each year without seriously, or at all, interfering with the advantageous proportion of males remaining for breeding purposes.

661. The existence of the breeding rookeries as distinct from the hauling-grounds of the young males, or holluschickie, was supposed to admit, and did in former years to a great extent admit, of these young males being killed without disturbing

the breeding animals. The young seals thus " hauling " apart from the actual breeding grounds were surronded by natives and driven off to some convenient place, where males of suitable size were clubbed to death, and from which the rejected animals were allowed to return to the sea. The carcasses were skinned on the killing ground; the skins salted, and at a later date bundled in pairs and shipped, with such duplication or checking of count as might be supposed to afford guarantees to the agents of the Government and to the lessees that the interests of both were fairly treated.

662. There can be no doubt that if the number permitted to be killed had been fixed at an amount so low as to allow for exceptional and unavoidable natural causes of interference with seal life, and if it had been re-arranged each year in conformity with the ascertained conditions, killing might have been continued without general damage to the seal life of the Pribylof islands, and very probably even with a continued gradual increase in numbers of seal resorting to the islands up to some unknown maximum point. Such results might have followed, notwithstanding the practical imperfection which clearly attached in execution to these theoretically appropriate methods, and in spite of the important change from natural conditions which any disturbance in proportion of sexes involved, if the demands made in the matter of annual take had been moderate; but when the number fixed for killing resulted, as has been shown, in an average slaughter of over 103,000 seals it bore so large a proportion to the entire number of animals resorting to the islands as to lead necessarily in the long run to serious diminution. This decrease continued, on the whole, in an increasing ratio, being due not only to the actual number of seals slaughtered, but also to the numbers lost in various ways incidental to the methods of control and *modus operandi* on the islands, which loss, though formerly a matter of minor importance (because counted against a large annual surplus), in the face of the greaty decreased numbers, became a very serious addition to the total of diminution. In short, from a transcendental point of view, the methods proposed were appropriate and even perfect, but in practical execution, and judged by the results of series of years. they proved to be faulty and injurious.

The President. — Will you be kind enough to remind us of the maximum annual number of the slaughter under the Russian rule?

Mr Carter. — At first it was somewhere in the neighborhood of 30,000. In the last years of their occupation, it was increased somewhere from 50,000 to 70,000.

Sir Charles Russell. — You will find, sir, a table giving the figures on page 132 of the British Commissioners report beginning in 1817 and going down to 1891.

Mr Phelps. — That is mere assumption.

Mr Carter. — We do not concede that to be a correct statement. It is your statement.

Sir Charles Russell. — It purports to be approximately a correct statement.

Mr Carter. — It purports to be that; in fact, it is not even approximately correct.

The President. — You do not know that the Russian Government had the same rule as the American Government had of fixing a limitation for the annual taking.

Mr Carter. — It did have the same rule.

The President. — The same rule all the time?

Mr Carter. — After the system was established of limiting the drafts to the males.

Senator Morgan. — In 1847.

Mr Carter. — The learned arbitrators will perceive from these passages which I have read from the British report that there is a full and unqualified concession that the methods thus employed by the American Government on the islands are perfect in theory, and the only defect in relation to them is in their practical execution; and the only particular here in which they mention a fault in the execution of those methods is that they do not confine the draft to a sufficiently low limit. What that limit is they do not affect to say; but the complaint they make of the execution in these methods is that too large a draft is drawn. My proposition is that there is a point at which it is perfectly safe to make a draft without any danger whatever to the herd. What that point may be is another question. We say 100000; and shall be able to make that good.

I have gone thus far only upon facts which I conceive either to be admitted or overwhelmingly established, established in such a manner that we may say they are beyond dispute. There are a good many other particulars here in which there is very considerable conflict in the evidence. We have our own assertions in respect to those points upon which this conflict exists; and we shall endeavor to satisfy the Arbitrators that our view is correct; but at this point I choose to say that in my view they are not material upon this question of property. I want to state a few of these points which I consider to be immaterial upon this question of property. I can argue this question of property without considering any of these disputed propositions.

These things are more or less disputed; and I do not base any part of my argument at present upon them. In the first place, it is said that not so large a proportion as 75 per cent of the pelagic catch is females.

If it were not anywhere near that figure if it was 20 per cent, it would answer all the purposes which I desire.

Second. It is not agreed that so great a number as one quarter or 25 per cent are wounded and are not recovered.

Third. It is not agreed that females go out for food at great distances upon the sea. Indeed, I cannot say it is agreed upon the side of Great Britain that nursing females ever go out for food.

Fourth. It is not agreed that coition takes place on the land. They assert that it takes place elsewhere.

It is quite immaterial where it takes place.

Fifth. It is asserted on the part of Great Britain that more or less commingling takes place between the Russian and the Alaskan herds.

There is no evidence that there is the slightest commingling; but as far as conjectures go, it is only to the effect that there may be a commingling of some few individuals wholly unimportant.

Sixth. It is not admitted on the part of Great Britain that the seals stay so long on the Pribilof Islands as the United States assert that they do.

That again is of no importance, whether they stay there five or four or

three months; if they stay there long enough to submit themselves to human power, so that man can take from the actual increase without disturbing the stock. That answers all the purposes of my argument.

Again, it is said that raids take place upon the islands and a point is made that a great many of these seals are lost not by pelagic sealing but by illegitimate raids upon the island by sealers which the United States does not protect against.

That is immaterial whether there are or whether there are not for the purposes of my argument; but there are not any in our view of any consequence.

And again, what I have already said that a drive of 100 000 young males is too large.

We do not think it too large. But what if it is. We can find out the right number. Experience will tell us that; and of course self-interest the strongest motive operating upon men will insure our obedience to its dictates.

Then again it is said that the lessees of these islands are careless and negligent in the methods of taking these seals and separating them and driving them for slaughter; the assertion being that the drives are too long; that they are made in a way that is oppressive to the seals; that a good many of the seals driven and which are not fit for capture but turned aside to go back again are so much injured that they never get back and are practically lost to the herd.

We conceive all those statements are unfounded; but even if they were true they would not be material. They would simply show we had been guilty of negligence there. There is nobody who is under so strong a motive to practice diligence as we are, and it is presumable certainly if there are any neglects that they will be ascertained and corrected.

The Tribunal thereupon adjourned until Friday April 21, 1893, at 11,30 a. m.

THIRTEENTH DAY. APRIL 21ST, 1893.

Mr Carter. — Mr President, the principal part of my argument yesterday was devoted to a review of the questions of fact connected with the nature and habits of the fur-seal and the modes by which they were pursued and captured, and that review of the facts led to these conclusions as matters of fact.

In the first place, that the United States, in consequence of their proprietorship of the Pribilof islands, had a control over the seals which enabled them to take the superfluous increase and supply it to the uses of the world.

That that opportunity it had always improved and still improves.

That no other nation, nor the citizens of any other nation, had the power or the ability to do that thing.

That the race of fur-seals could not maintain itself against unregulated and unrestricted attacks.

That it could be destroyed at a blow almost upon the land, and it could also be destroyed, though not so rapidly upon the sea.

That all pelagic pursuit of the animal was necessarily destructive in its tendency, and, if carried to any considerable extent, would work an entire commercial extermination of the race in a comparatively short period of time.

That it struck at once at the stock and not at the increase. Its depredations were principally aimed at the females and not at the superfluous males; and that no discrimination could be made.

I have now to call attention to the effect, or to the question how the question of property is affected, by those facts in the light of the principles which I have endeavoured to lay down respecting the institution of property, and the grounds and reasons upon which it rests. I wish to apply those principles to the question of property in the fur-seals, and bring to the application of those principles these conclusions of fact to which I yesterday arrived.

Now then, let me recall the main proposition early established in the course of my argument, and which I have endeavoured to keep in view throughout; namely this, that the institution of property extends to all things which embrace these three conditions. — *First*, that they are objects of human desire, that is to say objects of utility; *secondly*, that they are exhaustible, that is that the supply of them is limited, there not being enough for all; and, thirdly, that they are capable of exclusive appropriation. All things of which those three conditions can be predi-

cated are property, and nothing which does not unite all of those conditions can be regarded as property.

Now concerning the first two of these conditions no debate is necessary whatever. The utility of the animals is admitted. That they are objects of extreme human desire is conceded — that the supply is limited is also conceded — the race is exhaustible. There is not enough for all and the only question therefore as to whether they are property or not must turn on the determination of the point whether, or not, they are susceptible of exclusive appropriation.

That is the interesting point in reference to the question whether seals are property or not. — Are they capable of exclusive appropriation by man?

Now in the first place we must have a very clear notion of what is meant by the term "exclusive appropriation". What is it that must be done in order that an owner of a thing may exclusively appropriate it? Is it necessary that the thing shall be actually *in manu,* as it were — in the actual possession of the owner so that no person can take it from him without an exercise of force? Is that necessary or is something short of it necessary?

Well, in the early ages of property that seems to have been necessary, and possession and ownership were, in those early ages identical, or rather were confounded. There were no recognised rights of property, except in respect of such property as the owner was in the actual possession of. The skins upon the back of the hunter, the bow and arrow which he used in the chase, the hut, or the cave which he inhabited, were all in his actual possession, or under his immediate power. They could not be taken from him without an act of force. He was always present to defend it, and there were no subjects of property beyond those which could be possessed in this full and complete manner. But we see that as the institution of property is developed that is no longer necessary. A man may own not only the half acre of ground which he tills, and which he can immediately defend at all times, but he may own 100,000 acres by as perfect a title as he can own half an acre. In reference to all movable property, the extent of the ownership which is committed to him is unlimited. He cannot actually " possess " it. He cannot be present to defend it, yet the law stamps his personality upon it, so that it becomes his property, a part of him, an extension of his personality to some portion of the material world; so that when things which he thus owns are invaded his rights are touched; his personality is touched. Now here we see the difference between the two conceptions of possession and of ownership. Originally closely identified, inseparable from each other, as it were confounded together, but with the progress of society, and the development of the institution of property, separated, and the conception of ownership as distinct from the necessity of possession fully recognized.

Now I have many authorities to support that, but I cannot read them, or my argument would be too long, I must avoid reading authorities,

because it takes too much time, but to briefly develop it, I may read one or two, which are significant. I will read from page 82 of the argument of the United States, and an extract from the writings of a very distinguished English jurist, Mr Sheldon Amos. He touches upon this.

> The fact or institution of ownership is such an indispensable condition to any material or social progress that, even throughout the period during which the attention of law is concentrated upon family and village ownership, the ownership on the part of individual persons, of those things which are needed for the sustenance of physical life, becomes increasingly recognized as a possibility or necessity. One of the most important steps out of savagery into civilization is marked by the fact that the security of tenure depends upon some further condition than the mere circumstance of possession.
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> The use of the products of the earth, and still more, the manufacture of them into novel substances, consists, generally, of continuous processes extending over a length of time during which the watchful attention of the worker can only be intermittently fixed upon all the several points and stages. The methods of agriculture and grazing, as well as the simplest applications of the principle of division of labor, similarly presuppose the repeated absence of the farmer or mechanic from one part of his work, while he is bestowing undistracted toil upon another part; or else entire absorption in one class of work, coupled with a steady reliance that another class of work, of equal importance to himself, is the object of corresponding exertion on the part of others.
>
> In all these cases the mere fact of physical holding or *possession,* in the narrowest sense, is no test whatever of the interest or claims of persons in the things by which they are surrounded. "

And an extract from a French writer, M. Toullier, which follows there in a note is so long that I will not read it; but it is to the same effect, marking the distinction between possession and ownership, and showing that ownership is a development in the case of civilization in substitution of property and that ownership at present no longer depends on actual possession at all.

It depends on rights which the law gives. If the law chooses to stamp the personality of the owner upon any particular piece of property however large, or however extended whether it is in his possession or out of his possession, then that object upon which the law thus stamps the quality of ownership is the existence of exclusive appropriation according to the law. Now it is law that does this. Originally property depended on individual effort and the power of individuaI defence. Now in the development of civilization it depends on law, and whatever the law regards as the subject of exclusive appropriationis to be regarded as property, provided it presents the other conditions which I have mentioned. The interesting inquiry is, therefore under what circumstances and to what extent will the law stamp the quality of ownership upon things, which either are not possessed, or cannot be actually possessed by any owner during a considerable period of time — to what extent will the law assign to a man a title to defend them; that is the intersting question.

Now the best way of answering it is to see what the law actually does. Now we may take in the first instance the case of land. As I have already said land may be owned by a private individual to any extent. He may

own a Province if he can acquire it. The law places no limit upon it and it will defend him in that possession. Why is that?

As I have already shown the institution of property does not depend upon any arbitrary, but on great social reasons, and great social necessities, and the answer to the question why the law allows an extent of property to be owned by a man which he cannot by any possibility actually possess — when we come to enquire as to what that reason is, we must find it in some great social necessity, and it is obvious in the necessity to which I have alluded, namely, the demands of civilization, which make it necessary that the source of the fruits of the earth should be preserved, and their productiveness increased, in order to accommodate the wants of the increasing population of mankind. No land will be cultivated unless you award to the individual the product of his labour in cultivating it. The motive of self interest is applied to it, and therefore men are told, you may have, and we will defend your title to, as much land as you can acquire. That is the only way in which the earth would ever be cultivated. That is the only way in which it is made to produce the enormous increase which it now produces, and though it is not itself capable of actual possession by the owner, yet in view of the prodigious advantages acquired by stamping the character of ownership upon it, the law concedes that title, and assigns the title to an individual, and protects and defends him in it. The same is the case in reference to all movable property, all products of manufacture and of labour. Agricultural implements and tools, cloths of all descriptions, a man may own magazines full of them, which he cannot by his individual arm protect or defend; why is he permitted to do this?

Because the world cannot otherwise have them. They are the price which the world must necessarily pay for those possessions, or do without them, and it cannot do without them, and support the population which civilization brings upon the earth.

Take the case of useful domestic animals; the same thing is true. Man may own as many as he can acquire and he can breed, and they may roam over boundless areas almost, his own property or the property of the public, and still his title is complete and perfect. In the barbaric ages man could own but few, and when the number increased, it was the property of the tribe; but that condition of things would not support the demands of civilization. You must appeal to the cupidity of men and rouse them to efforts for the purpose of increasing the stock of domestic animals, and therefore a title is awarded to as many as a man can bring into existence. The great prairies and wastes of the interior parts of the United States, and the large regions of south America are fed upon by countless herds, and yet the title to everyone of them which he can identify is distinct and absolute. That is for the same reason : you could not have them unless you will give that ownership. Society could not enjoy the benefit unless it paid this price.

Now you will see that in all those cases, the owner is enabled to pre-

serve the principal without destroying it, and yet produce a great increase for the use of mankind. A cultivator of land, the title to which is assigned to him does not waste it, does not destroy it or convert it into a desolation or detract the richness from it and then leave it incapable of further production. He cultivates it and then manures it, He not only extracts a great product from it, but increases its ability for future production. So also in regard to the races of animals. The stock is not invaded so long as you allow the individual the ownership of whatever he is able to produce. They preserve the stock everywhere and they increase overwhelmingly the product which can be afforded for the use of mankind.

But step to an instance where this result cannot be accomplished, and society at once refuses to allow the individual property in them, refuses to consider the thing as a subject of exclusive appropriation. Take the birds of the air, the fish of the sea, or wild animals generally, and man cannot by any exercise of his art or industry so deal with them as to furnish their increase for the use of mankind without destroying the stock. He cannot do it. He can only attack them indiscriminately; he can produce no husbandry in relation to them, and if they maintaim their existence under his attacks, it is either because nature has made such an enormous provision that they are practically inexhaustible or because nature has furnished them with such facilities for escape that man cannot capture any considerable number of them. Consequently, in reference to all these wild animals, when the award of individual ownership to any particular man would produce no great social blessing, in other words, when there are no social reasons for awarding an exclusive possession, an exclusive possession is not awarded, and the thing is regarded as incapable of exclusive appropriation.

But even here, in the case of wild animals, though the establishment of the institution of property in respect to them would not accomplish any social good, would not prevent their destruction, still society resorts to the best means in its power to prevent their destruction and itself assumes a sort of custody or ownership over them by the establishment of what are called game laws, more or less effective for preserving the wild races of animals, but still sometimes ineffective where the demand for them is so great and the facilities for escape so little that the ravages of man become destructive.

Now, there are some animals which be near the boundary line between the wild and the tame, and it is very interesting to see how the law deals with these, and how perfectly in accordance with the principle which I am endeavouring to sustain. Take the case of bees. They are perfectly wild; nothing can be wilder. Nevertheless, man can induce them to return to a particular spot, and, in consequence of that, can take from the bees their product and can, therefore, increase the production of honey, — a most useful article — to an almost indefinite extent. If men were driven for their supply of honey to find the hives of wild bees in the forests, the demands never could be supplied, and the bees themselves

would be speedily exterminated because all the food which they ate would be taken away. But if you award a property interest in bees, if you permit a man to defend his title to them and to every swarm that forms itself in a hive and, at the appropriate season leaves to create a new habitation for itself, — if you give him a title to that and enable him to practice a husbandry in regard to it, — allow him to consider exclusively appropriate to himself that which, in its own nature, is absolutely incapable of exclusive appropriation, — if the law will step in to the aid of human infirmity and give those rights, then you can have this property multiplied to an indefinite extent, and society does it and does it for that purpose. The same is true of wild geese and swans. That is an industry which is not carried on upon the same scale, to be sure, as that of bees; but it depends upon the same principle. If we were driven to pursue the wild flocks according to such modes as are adapted for that purpose, the supply procurable would be extremely small; but if man can so far reclaim them as to wont them to a particular place and take the annual increase from them and preserve the stock without injuring it, then you multiply the product applicable to the uses of man. In other words, you bring in the occasion upon which the law will lend its aid to man and say these things shall be exclusively appropriated to him, and it does so. The case of deer is the same, upon which I have already enlarged; pigeons the same. The reindeer of Lapland is another instance of an animal essentially wild, but to which the law assigns to man a property interest and deems them as exclusively appropriated though they wander over vast regions; and, instead of following their owners, I believe their owners will follow them.

Now, we see the principle which lies at the foundation of the municipal law which I alluded to in the early part of my argument. The municipal law of all civilised nations concurs on this point, that, in regard to every one of these animals commonly designated as wild, if man can so deal with them as to take their annual increase and preserve the stock, then, notwithstanding that they may fly out of his possession at will, still if he has such a control over them that he can do that, the law will regard them as the subjects of exclusive appropriation.

But the law does not stop there. It is interesting to observe that it will go to all extremities wherever there is a social advantage offered and will allow a thing to be the subject of property and to be regarded as the subject of exclusive appropriation though it is absolutely intangible. Take Patents for useful inventions. Originally, of course, products of the mind were not the subjects of property at all; but as society advances and civilisation develops, as the need of these products of the mind increases, society perceives that it cannot have them unless it encourages the production of them; and there is no other way of encouraging the production except by awarding to the meritorious authors of them all the benefits of a property interest; and it does so. We have had, over a very long series of years a property right awarded in respect to inventions in the

useful Arts. The principle of a monopoly, odious in general, is applied here; and society does not, or rather will not, stop there. That extension of the rights of property to inventions in the useful Arts did not extend to a right of property in all the products of the mind. Literary works, books of every description, were still not the subject of property. They could be appropriated the world over by whomsoever was pleased to appropriate them, and without giving any ground of complaint to the author. But all of us understand how gradually and by degrees that has been considered to be a wrong, not in accordance with the principles of natural law, not in accordance with the principles of justice; and so, after a while, the rights of authors in their intellectual products were secured to them by Copyright Laws which are enacted, I suppose, in every civilised country.

Now there is a tendency and a determination, let me say, to carry it still further, and an international Copyright Law, securing the benefits of ownership in the products of the mind all over the world, is impatiently awaited and will probably, ere long, be enacted.

This is the development of the institution of property. This is the development of the conception of ownership as distinguished from actual possession. Society will award this right of property; society will determine that things can be exclusively appropriated wherever there is a social good to be accomplished. It is thus that human society, proceeding step by step and from age to age, rears its majestic arrangements, making provision for the satisfaction of every want of man and every aspiration of civilisation, and shaping and conforming these arrangements in every particular and at every step in accordance with the dictates of natural law.

Now, what is the general conclusion which I conceive to be established? It is this in respect to animals, that wherever an animal, although commonly designated as wild, voluntarily subjects itself to human power to such an extent as to enable a particular man or a particular nation to deal with that animal so as to take its annual increase and, at the same time, to preserve the stock, it is the subject of property. That proposition seems to me to be so reasonable upon the mere statement, that it ought to be allowed without argument; but I have endeavoured to begin at the beginning and to shew that every ground and every reason which supports the institution of property anywhere and to any extent, applies to that case.

Now, it only remains to apply that conclusion to the particular animals about which our controversy is concerned, the seals. I need not, of course, recapitulate the facts; they are all fresh in your recollections. It is enough to say that they do submit themselves voluntarily to the power of man to such an extent as to enable the owners of the Pribilof islands, to whose power they thus submit themselves to take the superfluous annual increase without destroying the stock; and that that is the way and the only way in which the human race, under civilised conditions, can continue to enjoy the benefits of that blessing of Providence.

Unless an award of property is made to the United States in that animal, or what is equivalent to it, the fate of the animal is already sealed.

In looking at the meritorious features which the owners of the Pribilof islands exhibit and which constitute their title to this award of property, it may, at first sight, appear that they do not have the same sort of title that the cultivator of land has to the bushel of grain that he produces, or that the manufacturer of an agricultural implement has, which is in every part of it the fruit of his own labour. But when you look closely into the case, you will see that the merit of the owners of those islands is of precisely the same character and goes to the same extent; and that the present existence of that herd is just as much due to meritorious voluntary exercise of effort on the part of the owners of those islands as any product of mechanical art is to the workman who fashions it.

This species of property it will be remembered is called by Blackstone "property *per industriam*", and very properly called so. Now what industry is exhibited by the owners of these islands to entitle them to occupy that place? They removed a population of hundreds of people at great expense and keep them there to protect these animals against all enemies and to protect their breeding place against all enemies, and of course unless that were done those who were in pursuit of them would swoop down upon those islands and destroy them at once. They preserve them.

In the next place they do not kill them themselves indiscriminately. They practise abstinence and self-denial. They might themselves kill every animal as he arrives, and put his skin on the market at once, and get the full benefit of it. That is the temptation always of man, to present enjoyment; to take the utmost that he can, and to take it at once; but the owners of the Pribilof islands practise self-denial. They do not do it. They forego present enjoyment. They forbid themselves that practice, and they do it in the hope of obtaining a future and a larger good. I wish to dwell a moment upon the merits of that particular feature of abstinence. I have given a multitude of citations which illustrate the merit of this quality of abstinence, as a foundation for property.

All political economists, for instance, in treating of the question of interest, and the moral right which a man has to exact interest for the use of money, defend it on this ground. Capital is lent, and interest is taken upon it. Well, what is capital? It is the fruit of savings? A man who has produced something, instead of spending it in luxury, saves it, and when he saves it no man can save for himself alone. He saves for the whole world as well. He saves something which will support productive industry, and the whole productive industry of the world depends on the savings of the world, and if it was not for the practice of this abstinence which leads to the accumulation of wealth, and the accumulation of wealth which may be employed for the purpose of sustaining productive industry, productive industry would be impossible.

Now Senior, in his Political Economy — and he is an author of recognized authority — I read from page 93 of the argument, says.

But although human labour and the agency of nature, independently of that of man are the primary productive powers, they require the concurrence of a third productive principle to give them complete efficiency, the most laborious population inhabiting the most fertile territory, if they devoted all their labour to the production of immediate results and consumed its produce as it arose would soon find their utmost exertions insufficient to produce even the mere necessaries of existence.

To the third principle or instrument of production, without which the two others are inefficient, we shall give the name of *abstinence*, a term by which we express the conduct of a person, who either abstains from the unproductive use of what he can command, or designedly prefers the production of remote to that of immediate results.

Wherever you find among men the disposition to forego immediate enjoyment for the accomplishing of future good, you find the prime element of civilization and which society encourages, and worthily encourages in preference to others and that is what is accepted as its principles. The United States, and its lessees, do not destroy these animals as they come. They invite them to come. They cherish them while they are there; they protect them against all other enemies. They carefully encourage, as far as they can, all the offices of reproduction, and at the appropriate time they select from the superfluous males, who cannot be any good to the herd (and might, under circumstances do injury to it), the annual increase of the animals and apply it to the purposes of mankind; and without the exercise of those qualities it is perfectly plain that that herd would have been swept from existence half a century ago, and the Pribilof islands would have been in the same condition in respect of seals as the Falkland islands and the Massafuero islands, and the other localities near Cape Horn, once the seats of mighty populations of seals.

Now it is upon that, that I base the position of the Government of the United States, that it has a right of property in the seals — upon every principle upon which the law of property rests — there is no principle which does not defend it; and so far as the municipal law itself speaks, it defends it completely and absolutely. If we step beyond the boundaries of municipal law to the moral law, and the law of nature — to that law, which is the foundation of international law — it speaks also with a concurring voice; and in whatever direction we prosecute our researches for grounds or reasons upon this subject, they all concur and contribute to this one conclusion — that upon every ground of right and reason the property of the United States in the seal herd is complete and absolute, not only while it is upon the islands but wherever it wanders protected by the safe-guard which property carries with it wherever it has a right to go.

Well now, if there were anything which you could urge against this conclusion, we might be disposed to hesitate; but what is there that can be urged against it? What right is there that can be set up against it?

If there were anybody that could set up a right against this conclusion, a different case would be made out. If any man or any set of men, or any nation could say: This conclusion of yours forcible enough in itself — defensible enough in it self — nevertheless comes in to conflict with a right of ours defensible upon like grounds, — that is, moral grounds. If that could be set up it would raise a doubt.

But what is there? What right is there in these pelagic sealers — for that is all we have to deal with — to contend against this conclusion? What is their right founded upon? As near as I can ascertain it, it is a right to pursue that animal because he is a free swimming animal, in the first place; and, in the next place, there is no power on the sea to prevent us. That does not suggest a principle of right at all — a right to pursue an animal because he swims freely in the sea — a right to destroy him on that account! What ground is that upon which a right could be established, I should like to say? Why should you be permitted to destroy a useful race of animals, a blessing to mankind, because they happen to move freely in the sea? I cannot perceive that that suggests even a shadow of a right. Then you come to the other ground — that however perfect your right may be you have got no power to interfere with us — that assumes that, that says in substance: we have a right to pursue the seals, because we have a right to do a wrong upon the seas. There is no more right to do a wrong upon the sea, than there is upon the land. What is this right to carry on pelagic sealing? What is this right to take these free swimming animals in the sea, mostly females heavy with young, or suckling their pups? What is that kind of a right? We have seen that it necessarily involves the destruction of the animal. How can you connect the notion of a right with that? It is a right to sweep from the face of the earth, and deprive mankind of the use of a useful race of animals. What sort of an act is that? — to destroy a useful race of animals? Why it is a crime, is it not? How else can it, by any possibility, be described? It is a crime against nature. It is a defiance of natural law; and if it were committed within the boundaries of any civilized and christian state, would be punished as a crime by municipal law. It has no characteristic and no quality but that of a crime. What good does it accomplish? Does it give to mankind a single seal which cannot be taken in a cheaper and less expensive way? No. We have already shown that — I have already shown it — that the entire product of this animal can be taken upon the islands in a less expensive method, and in a way such as to preserve the quality of the skins in a better manner.

It does not do a single good to mankind. Doubtless it is possible that seals may be afforded at a less price, for a time, to the world by the process of pelagic sealing. Of course, if you can put upon the market in addition to what is taken upon the islands another hundred thousand seals taken out of the water, you may reduce the price, and although the method of taking them is more expensive, the world might yet them for a while at less cost.

But what is it? You are taking the stock are you not? You are not taking the increase.

The question and the only question is how the increase of the animal can be best taken for the purpose of mankind? You have no right to take anything else. Anything else is destructive. Therefore they are doing no good to mankind; they are doing no good to mankind; they are doing no good to anybody; they are destroying the occupations of the large number of manufacturers — thousands in number — who reside in Great Britain, and whose occupation consists in manufactering the skins for market. Their occupation is taken away by it. They are doing injury in every direction. They are doing no good to any one — not even to themselves, for their own occupation is gone in a few years. Nature has so ordered it that any pursuit or occupation like this which consists simply in destroying one of the blessings of Providence does no good, and nothing but evil in any direction. We say: We are taking the entire product of this animal; furnishing it to the commerce of the world in the least expensive and in the best manner, — why do not you permit us to do it — why break uh this employment? There seems to be no good reason for it.

Then, again, as I have already said in an earlier part of my argument, one of the limitations to which property is subject and especially property owned by nations, is that it is subject to a trust for the benefit of mankind. Those who have the custody of it and the enjoyment of it, have a duty in respect of it. Rights spring out of duties rather than duties out of rights. It is the duty of the United States to cultivate that bounty of nature, the possession of which is thus assigned to them, and make it productive for the purpose of the world. That is their duty; why should not they be permitted to perform it? Can a reason be assigned why they should not be permitted to perform that duty; and they cannot perform it if it is destroyed. Has the United States a right to destroy that seal? The *power* it has got, but has it the *right?* Has it a right to go to the island and club every seal to death it finds there, and thus to deprive the world of the benefit of them? Certainly not. Have pelagic sealers any better right than the United States have? Certainly not. I have no doubt that if the United States should wilfully say : we will destroy that property—although having the ability to preserve it we will destroy then this property—if it were a case of the possession of property the use of which was absolutely necessary to mankind—if the seal for instance contained some quality which was highly medicinal—a specific to certain diseases which affected the human race and the possession of which was necessary in order to enable the human race to withstand such disease—the human race would have a right to interfere, and take possession of these islands and discharge those duties which the United States were betraying. What duty have these pelagic sealers in reference to this herd of seals?

They have none, because they cannot do anything but mischief with

them. The United States has a duty — it is to cultivate that advantage which, in the great partition among nations of the blessings of the earth, has fallen to their lot. It is the duty of the United States to preserve it, to cultivate it, and to improve it. Shall they not have the power to do it? Is it not the duty of every nation and every man to withhold their interference? It seems to me that nothing can be plainer than that conclusion. There is no right, therefore, that can be set up against it. Well, if there were something less than a right — if there were some inconvenience, even, to which mankind were subjected if pelagic sealing were prohibited, and an exclusive property interest awarded to the United States — if any inconvenieuce arose from such a consequence as that, we might hesitate; but there is not. There is no inconvenience even. There is, indeed, a *suggestion* on the part of Great Britain of an inconvenience in that particular. It is said that this is the building up of a monopoly for the United States, enabling them to gain a monopoly in this article, and thereby acquire a great profit. Well, I admit that it is a monopoly. There is always a monopoly when one particular nation or one particular set of men own an entire source of supply — not an absolute monopoly, because there is a certain competition on the part of Russia and Japan; but it is in the nature of a monopoly of course. Where there is an object in nature, of which the supply is limited, if the source lies wholly within the power of some particular nation, it must necessarily have a monopoly — it is unavoidable. But it is a monopoly to the United States, of course only because the United States happens to have those particular islands. The possession of them — the sovereignty over them — must be awarded to some nation, and therefore a monopoly is, in a certain sease, necessary. But is it an injurious monopoly — is it an objectionable monopoly? Not at all.

Senator Morgan. — The islands were bought chiefly on that account, were they not?

Mr Carter. — I do not know that they were. I hardly think they were.

Senator Morgan. — What else was there?

Mr Carter. — There was not much else except territory. It is sometimes said they were, and there were some evidences I have read tending to show that was one of the main considerations; but whether that was the real motive or not I cannot say. I do not resort to that as furnishing the slightest strength to my argument it is just as powerful without it. I wish to rely only upon the most essential considerations; but I am speaking as at whether it is a monopoly or not. Now when does a monopoly become injurious to men? Why it is only when it is an *artificial* monopoly. If there is a natural monopoly in a particular product and the whole of that particular product is thrown upon the world, the price of it will necessarily depend upon the relation between the supply of it and the demand for it, provided the whole of it is thrown upon the world. Sometimes there is a monopoly, in a particular region of the world of a

particular article; but if the whole product of that particular region were thrown upon the market, the price of it would be extremely cheap, and pay but a small profit, and mankind would get it at a very low rate. That is supposed to be the case as to the spice islands belonging to Holland.

If you threw the entire pepper that is produced on those islands, and other spices, upon the markets of the world, they would be glutted. The world would get them at a very trifling sum, and the producers of these spices would make no profit at all. Well, what did the proprietors of the spice islands do? They did not simply withhold from the market, for that would answer no purpose. If you withhold a thing for sale for a price, and afterwards throw it on the market, the mischief is accomplished, and it worse than it would be if you threw it all there as it is produced. But they made an artificial scarcity by destroying half the crop and thus creating a scarcity, and the world now having no more than half, they were enabled to make a great profit. That is one way in which a monopoly of a natural product could be made use of unfairly and disadvantageously to mankind, and be made the means of exacting an exorbitant price. You must create an artificial demand. You must limit the supply; you must withhold from the market something, and therefore compel a great exaction. But not only has that never been done here, but it never can be done I say it never can be done, because no profit can ever be found in it. There is a demand for every sealskin that can be produced, and a profitable demand for every one that can be produced, and the whole supply is thrown upon the market. There is not one whit held. Now, therefore the world is not compelled to take a single seal, and if there is a large price paid for the seal under those circumstances, that price is simply the result of competition among those who want them.

If any body is required to pay a large price for them, it is because somebody else is ready to pay a larger. Contributing them to the commerce of the world, as I have already said, is just like putting them up to auction. The world bids for them, and they go where the highest price can be paid for them. Now here the lessees of the islands under these circumstances make, as they probably do make — (of course taking into account the revenue that is paid to the United States, and the profit of the lessees besides, all of which must fairly be regarded as the profits of the industry) — a very large profit on every skin that is sold; that is to say, the price of them pays two or three times over all the labor and all the expense which the gathering of the product costs. A very large profit is made upon that cost to the United States, or its lessees, distributed among them, which is exacted, of course, from citizens of the United States as it is in proportion to the rest of the world; but it goes to the United States and these lessees, and what objection is there to that?

Is that any thing more than a fair remuneration for this bounty of Providence which is placed in their custody and in their control, and for their labour, their efforts and their exertions in preserving it and furnish-

ing it for the use of mankind? Of course not. It is perfeclty fair. It may be the source of a profit. So there are a thousand things in commerce that are sources of profit to the particular nations which have an advantage over all other nations in dealing with them, and the advantage is no different in its nature in this case than it is in the rest. In short it comes to this — that it is only by exercise of the care, industry, and self-denial, on the part of the Government of the United States, that the world can have this blessing. It is reaped, and the whole of it is thrown open to the world, and the price is determined solely by the buyers — by what they see fit to give. If the owners of the islands should see fit to with-hold from the market at any particular time any considerable number of the skins what would they do with them — how would they gain by that procedure at all? When there comes the next year or the next year after that — ome time or another they would be obliged to throw it upon the market, and that would depress the market so that the loss they would incur in that way would far exceed any gain that there was any promise of. No, there never could be any temptation to keep any part of the products except there may be very exceptional circumstances — a decline in the demand owing to some change of fashion — and it might be expected there would be a recovery from it which might induce the proprietors of the islands to say: "We think we can do better with the skins next year than this", or something of that sort. But in general they can reap no unfair advantage from the possession of this natural monopoly.

There is another suggestion. I observe in the Case and Argument on the part of Great Britain that these meritorious grounds upon which the title of the United States depends, are of course perceived upon the other side; and they seek to find something of a similar nature on which to support their alleged right. And what do you find? I have discovered two things which they put forward — suggestions — in some way. One is, recognizing the natural advantage which goes with the ownership of the islands owing to the seals submitting themselves fully to the power of man. The thing which they put against that is, they say:

This seal has two habitats. One is on these islands, and the other is in the sea along the coast of British Columbia — that is, they seek to attach the seals to British territory — Canadian territory — and they say: "We have a superior right also grounded upon these favorable conditions locality and so forth; these seals are right along our coasts". Well, that does not amount to enough to consider of course. It is not an advantage which enables them to deal with the seals in any different way; they still cannot take them in any other way except by this indiscriminate pursuit, and sacrifice the males and females alike, or females to a much greater extent than males.

It does not enable them to practice the husbandry in respect of the animal and to give to mankind the benefit of the increase without destroying the stock; and so it should be dismissed even if it were true in fact.

It is not true in fact — it is only conjecture. The seal has no winter habitat ; he is on the move all the time, and if he has a habitat along the coast of British Columbia he has the same habitat along the coast of California and Oregon which is a territory of the United States, and along a vast extent of the southern part of Alaskan territory, and the Aleutian chain. The winter habitat along the coast of British Columbia, if it were anything but an imagination, is too slight to form any figure in this discussion.

Now what is the next ground of merit? It is rather more singular as it seems to me. They say : the seal consumes, along the shore of British Columbia, a great many fish in the sea; and the suggestion is, I suppose, that if the seals did not consume those fish, the inhabitants of these shores would catch them, and therefore they take away this fish from them — in other words the intimation is : We feed these seals with our fish. Well, all I have to say is that the fish which they consume — these squids, crustaceans, cod, and what not which these seals take, are not the property of Canada or of Great Britain — they are the property of mankind. Mankind feeds these seals. It is from mankind that they get their sustenance. They take it out of the illimitable sources of the sea — not the property of any nation, but of mankind. I grant you that the circumstance that mankind feeds the seals with its own fish in this way gives mankind the title to the fish. The fish belong to mankind — that is my position, that is our position — and we give them to mankind; and mankind can work out its true and beneficial title only by employing the agency and the instrumentality of the United States. That is the only way it can get it.

All it can say, is, to the United States : " You have by nature this extraordinary advantage of locality and position; you have the ability to take the whole annual increase of this animal, and furnish it to the world if you would only cultivate it. It is your duty to do so, and when you do that, we get the benefit of these seals, and get them in the only way in which they can be afforded to us". Therefore the argument that the fish that support these seals, are fish belonging to British Columbia, and that therefore they have any equity of a superior character to that of any other people, entirely disappears.

Now in reaching these conclusions as to property in seals, it will be observed that I rely upon no disputed facts — upon no facts which are open to serious dispute. I have said so — at least my assertion in that particular may not be accepted — but I feel quite sure that when the members of this Tribunal come to consider the facts they will agree that all that I rely upon here are placed beyond dispute; they are either indisputable in themselves — that is, conceded — or else placed beyond dispute by the evidence.

But I could really make my argument upon a much narrower ground, in fact, and keep myself within it and which is absolutely undisputed. Here is the Joint Report of the Commissioners, and the matters upon

which they are agreed will be found on page 309 of the Case of the United States :

> We are in thorough agreement that for industrial as well as for other obvious reasons it is incumbent upon all nations and particularly upon those having direct commercial interests in fur-seals, to provide for their proper protection and preservation.
>
> Our joint and several investigations have let us to certain conclusions, in the first place in regard to the facts of seal life, including both the existing conditions and their causes; and in the second place in regard to such remedies as may be necessary to secure the fur-seal against depletion and commercial extermination.
>
> We find that since the Alaska purchase a marked diminution in the number of seals on and habitually resorting to the Pribilof islands has taken place : that it has been cumulative in effect, and that it is the result of excessive killing by man.

The President. — Is that quite in accordance with what you stated? I think you stated the diminution had taken place ever since 1884. This seems to be since the Alaskan purchase — that is since 1867.

Mr Carter. — Well, this Report does not state the diminution at successive periods; it states the beginning of the diminution.

The President. — Your statement I believe was, that the draft of 100,000 seals a year would not affect the existence of the herd.

Mr Carter. — That is my statement.

The President. — That draft was observed for several years after 1867, — after the Alaska purchase.

Mr Carter. — Yes; but it will be observed that there was a prodigious taking just prior to the establishment of regulations by the United States which diminished the amount of the herd, and undoubtedly the diminution began then in 1869; and unless we were prevented by pelagic sealing I have no doubt that the draft of 100,000 a year could be maintained. But these Commissionners say, and I take their statement : —

> We find that since the Alaska purchase a marked diminution in the number of seals on and habitually resorting to the Pribilof islands has taken place; that it has been cumulative in effect, and that it is the result of excessive killing by man.

I take that finding to mean this : That this herd of fur-seals is at the present time in the course, of extermination, and that that extermination is due to killing by the hand of man. I take those two facts, and that is all that is necessary, for the purpose of establishing a full foundation for property argument. It follows from that fact that the fur-seals must perish unless their killing is regulated; and it follows from that, that all unregulated killing is wrong. It follows from that that the extermination of the seals, which is in progress, is due to unregulated killing. I do not say now unregulated where — and it follows that all unregulated killing is wrong because it leads to destruction. We know that there is a mode of killing by which the race can be preserved, and that is by confining it to the Pribilof Islands. We know that sealing upon the high seas cannot be regulated. All unregulated sealing is wrong. Sealing upon the high seas is, and must always be, unregulated, because no descrimination is

possible between the stock and increase; and more than that the attack of pelagic sealers is probably upon the stock and not upon the increase, because wherever a single female is killed the stock is struck directly. Therefore, standing upon the mere finding of this Joint Report, there is fact enough upon which all the Conclusions of my arguments may be sustained. There are some technical objections that are urged against the conclusion of property. It is said that you cannot identify these seals perfectly — that the seals you find on the Pribilof Islands might perhaps come from the Russian Islands. As I have said all that is founded on conjecture. In dealing with a large subject like this, the mere possible circumstance that there may be an occasional commingling affecting a few individuals is of no consequence at all — no judicial tribunal would take notice ot it.

The great fact is obvious, and I think admitted, that the great bulk of the herd which is on the North — west coast of America and between the Pribylof Islands and the State of California — the whole of that has its breeding place on the Pribylof Islands; and every individual of it, at some time or another, visits those Islands and submits itself to the power of man there.

There is another thing that is suggested, and that is, if a property right should be allowed in these animals to the United States, it might interfere and prevent the enjoyment, by the Indians along the coast, of an immemorial right and a privilege of theirs to hunt seals for their own purposes. Now that right of the Indians; such as it is, deserves very respectful consideration. It stands upon something of the nature of moral grounds; I admit they have something in the nature of a better claim than these pelagic sealers. There is some reason for saying you should not deprive these Indians, (who have lived along the coast always, and who have from time immemorial supported themselves to a greater or lesser extent, by going in their canoes on the sea, and spearing seals) of that important means of subsistence. It might be subjecting them to starvation; and you would have to support them at last, if you did that. There are some powerful considerations there, the force of which I have no disposition to disguise. But what is the nature of that case?

That is a pursuit of this animal not for purposes of commerce, but by barbarians (for they are such), for their own subsistence, and it is a pursuit which of itself makes an insignificant attack, as it were, upon the seal herds; and it is a pursuit which (considering the magnitude of that herd, and the condition, the size which it would reach if left to its natural enemies), I have classified and considered as among the natural enemies of the herd, just as much as the killer-whales. It is insignificant in amount, and does not affect the size of the herd. It does not affect any of the conditions which I have considered as necessary for the preservation of the existence of the herd. It is, therefore, a pursuit which may be tolerated without danger to the herd. Now, therefore, it is quite possible that the United States should have a property interest in these

seals, subject however, to the right of the Indians to pursue them in the manner in which they were accustomed to do in former times, that is to say, for their own purposes. It is a barbaric pursuit. That is an instance, with which the government of the United States is perfectly familiar, of the survival of the barbaric condition contained in the civilized life — a condition with which the Government of Great Britain is also perfectly familiar, because it has to deal with it in many quarters of the globe. So long as they subsist, and until they are provided with other means of subsistence, they should be allowed to pursue their natural means of subsistence; and that is one. It is not one that would threaten — endanger the existence of the seals at all; and it cannot be supposed that the United States would ever undertake to interfere so as to deprive these Indians of their rights. But there is one limitation to that — that is, the survival of barbaric conditions. It is a barbaric pursuit, and being a barbaric pursuit it does endanger the existence of the herd, because it is not carried to a sufficient length — there is not a population sufficient dependent, upon it. But it will not do, under the cover of that pursuit, to allow civilization to attack the herds of fur-seals.

It will not do to employ these Indians, and put them out upon the high seas, there to attack these seals for the purpose of furnishing them to commerce. That is not a dealing of barbaric nations with seals — that is a dealing of civilized nations with seals. Barbaric nations have rights that civilized nations have not, under certain particulars. As I said before, many times in the course of my argument, the attack by barbarians on the fruits of the earth is limited, confined, and generally not destructive; but when civilization makes her attack upon them her methods are perfectly destructive, unless she makes use of those appliances which civilization teaches her by which that destruction may be avoided. Therefore there is no difficulty in awarding to the United States a right of property, subject to the right of the Indians to capture in the manner in which they were formerly accustomed to do before the use of vessels for pelagic sealing; but not a right to go out and engage in pelagic sealing.

The President. — Do not you think it very difficult to draw a legal line of limitation between what an Indian is allowed to do for himself, and what he may be allowed or permitted to do in the service of a European or civilized man?

Mr Carter. — There are always practical difficulties connected with dealings with barbaric tribes — greater or lesser difficulties — but not inseparable difficulties connected with it.

The President. — Do you find that there is a substantial legal difference between the two cases?

Mr Carter. — There is a substantial one.

The President. — Between the case of an Indian fishing on his own account and an Indian fishing on the account of a civilized man?

Mr Carter. — I think there is a very substantial one.

The President. — A substantial legal one?

Mr Carter. — Yes when I speak of " legal " I mean moral. We are on international grounds — international law, and there is a sharp distinction.

The President. — Moral and international are different fields of discussion, I think; but they may often join.

Mr Carter. — They are not so different as may be supposed.

The President. — They are not contrary.

Mr Carter. — Oh no. international law rests upon natural law, and natural law is all moral.

The law of nature is all moral, and it is the great part of international law. If the dictates of the law of nature are not repelled by any actual usuage of man, then they must be allowed to have their effect, and the dictates of the law of nature are the dictates of international law; and to say that they are moral does not distinguish them at all from such as are legal. We have sharp distinctions in municipal law between what is moral and what is legal; but in international law whatever relates to the actual human concerns, the property of nations, and actual affairs, and whatever is dictated by the law of nature is not only the moral law, but the legal law also. Now there is the broadest sort of difference between the two cases. The Indian goes out and attacks and kills a seal for the purpose of sustaining himself, making a skin which he is going to wear, and getting food to eat.

Lord Hannén. — Is it to be confined merely to their substenence? Were they not the only suppliers in the first instance of the seals? They bartered the skins; there was no other source until the Pribylof Islands were discovered. That trading which is so frequently referred to was a trading in these amongst other skins.

Mr Carter. — That is true. They were the original traders and they were made use of by the purposes of commerce but what I mean to say is, that was *commerce*.

Lord Hannen. — Yes, carried on by the natives.

Mr Carter. — I know: but that was commerce. They were supplying the commerce of the world. They were not supplying themselves with clothing — they were not furnishing themselves with seals for food.

The President. — That you would consider was legal at the time, but would not be legal now.

Mr Carter. — Before the Russians discovered these regions they were inhabited by Indians, and these Indians did pursue seals in that way. It is a pursuit by barbarians without method — without making any effort to preserve the stock; destructive, of course, in its character, but not of sufficient extent to endanger the existence of the race of the animal. As I have said, it is only when the world makes its attack, through commerce, that the existence of the race of animals is in danger — it is only then; and when that begins then the danger begins, of course, at first, the beginning of it was when the Russians first discovered this country, and treated with these Indians, and got these skins. That was the beginning

of the attack by the world generally upon this stock of seals. That was the beginning of an attack by civilization, through commerce, its great instrumentality. Of course, before, at a very early period when the draft was very small, it did not threaten the existence of the stock at all, but by and by, it does. Now when the existence of the stock is threat ened, what are you to do? That is the question.

The President. — That is a point of fact. That is a difference in fact which might create a difference in right, according to your view.

Mr Carter. — The distinction which I mean to draw is a distinction of a resort to the seals for the purpose of the personal use of the people, such as they were in the habit of making, before they were discovered by civilized men — the distinction between that pursuit, and that which is promoted by civilized men for the purpose of supplying the world with these skins. That is the distinction. The first pursuit which is confined to the barbarians, is not destructive of the stock. Nor is the other, as long as it is limited to certain very narrow proportions and conditions. But when it is increased, then it does threaten the stock. What must you do then. You must adopt those measures which are necessary to preserve the stock; and what are the measures which society always employs for that purpose? I have detailed that already — it is, to award the institution of property. Now must society with hold its effort — must it forbear to employ those bounties because here are a few hundreds of Indians in existence who may have some rights in reference to them? No, they are not to be considered, surely. We cannot allow this herd of seals to be extinguished just for the purpose of accommodating a few hundred Indians upon that coast — surely not.

The President. — It may be that the civilized fishermen may not be more than a few hundred also. The number of men employed is not absolutely a foundation of legal discrimination — a legal duty.

Mr Carter. — You mean those employed on the Pribilof islands may be a few hundreds?

The President. — I mean, the pelagic sealing may be carried on by a few hundred Indians, but that is no matter. The difference that you make is whether they are Indians or civilized.

Mr Carter. — Yes.

The President. — Suppose Indians make commerce, selling or bartering their skins — you allow that also?

Mr Carter. — Where it is not destructive.

The President. — It is a question of proportion — of measure with you.

Mr Carter. — If it is destructive, then it is not to be allowed. They have no right to destroy the race of animals.

The President. — In order to give you satifaction, the question would be to know within what limits pelagic sealing may be carried on without being destructive?

Mr Carter. — Yes, that is practically the question. If you say pelagic sealing can be carried on without being destructive.

The President. — By Indians, at any rate?

Mr Carter. — By Indians in their canos in the way in which it was originally carried on. That does not threaten the existence of the herd.

The President. — That is a natural limitation.

Mr Carter. — But it is possible to do this. It would be possible for those who are now engaged in pelagic sealing for instance to say : " The Indians are permitted to carry on pelagic sealing; we are prevented from doing it. We will just employ those Indians. "

The President. — That is the difficult point which I just hinted at.

Mr Carter. — They might say : " We will employ these Indians and employ them to do the work we are prohibited from doing. The Indians are perfect sealers, and can destroy this race of animals as quickly as anybody else : if you bring civilization to bear upon them, and hire them to go out there, you could do it in that way. " I argue that thing cannot be done. The principal grounds and reasons upon which I rest the right of property in the United States, proceed upon the assumption that the blessing of Providence are to be preserved and made continually useful to man, and whatever mode of attack is made upon them which is in violation of that principle, must be suppressed.

Senator Morgan. — Mr Carter, if you will allow me, I understand your position to be this — if I am mistaken correct me : that the United States Government being the owner of the seals, has a right of making an indulgence or exception in favor of these Indian tribes because of their dependent condition, and should do this, so long as they conduct that sealing in accordance with their original customs?

Mr Carter. — Yes.

Senator Morgan. — Now, I wish to suggest that both Great Britain, and Canada, and the United States, have found it necessary (in order to establish and promote the agriculture, commerce, and the peace of the whole country), in respect to Indian tribes, to deprive them, at their will, of all what are called their natural rights of hunting and wandering — their nomadic wanderings — and confine them to reservations; and all of these countries have found it absolutely necessary to do so until it is a matter of universal and admitted law throughout the continent of North America, until you get to Mexico at least, and in Mexico, that the Indians shall be dealt with in such a way as the supreme powers choose to do in their general public policies, giving them, in the United States (and doubtless in Canada), the privileges and benefits of the provisions of the Constitution which operates in favor of the personal rights of liberty, property, and so forth; but neither of these Governments have ever hesitated on any occasion since they had the power to enforce their laws against natives, to confine them to reservations — cut them off from hunting on the plains, the wild buffaloes, deer, and all other wild game, and absolutely to enclose them within bounds which they are not permitted to go beyond at all.

Mr Carter. — Of course that is perfectly established in the practice of nations.

The President. — Is it so in Canada Mr Tupper?

Mr Tupper. — Since the President has referred to me, I might say there is a distinction in the case of the Canadian Pacific Coast Indians. For instance on the Plains, the Government representing the crown, make this arrangement by and with the consent of the various tribes, who thus come then under what are called treaty rights made with the crown. They have certain privileges, and, coming under the protection of the crown, submit themselves to the care of the Government. The Government provides for them, giving them their rations and supplies, and for the sake of those, and for their support, they submit themselves to the regulations under the Government. But on the Canadian Pacific Coast the Indians, are as free as the whites.

Senator Morgan. — Mr President, if you will, allow me, to my statement of the power thus exercised I will add, if it is exercised in a single instance by Canada or the United States, of course the whole power is necessarily implied. Now when we speak of a treaty with an Indian tribe, we do not speak of it in the sense of that, an engagement with a foreign Government : the Indians are entirely within the limits and dominion of the respective Governments in America, and the treaty I have spoken of is a mere agreement for the purpose of pacifying them, and not based on the idea that they have any sovereign right to treat at all. They are the subjects of the general Government, and more particularly so, I think, than can be found anywhere else in the world. That is the universal history of the North American Continent. Indians in the decisions of the United States supreme fourt are called the "wards of the nation", and the United States are their guardians.

Sir John Thompson. — In addition to what Mr Tupper has said, the only penalty for roaming contrary to the provisions of the treaty is, the withholding the benefits of the treaty from the Indians. There is no law in any part of the country to prevent an Indian going where he pleases. Perhaps I ought to add to that, in reference to Mr Carter's position, that in establishing close seasons for fishing and hunting, the Indian is included as well as the white; but an exception is made in favor of such as he may take by fishing or hunting for his own sustenance.

Mr Carter. — All this survival of barbaric conditions in any civilized life is a perfectly familiar problem both to Great Britain and the United States in reference to many parts of the world. It presents this difficulty, no doubt. They are dealt with as they can best be dealt with and sometimes it has been said, and probably with truth, with injustice and cruelty to the native inhabitants; at other times, with great liberality and generosity to them. The problem is, no doubt, a difficult one; but the difficulty of it does not dispense with the necessity to properly deal with it.

Then, how is it to be dealt with? Here are many thousands of Indians in the western part of the United States living upon tribes of buffalo that

feed over a boundless area of territory; and here is a vast population pressing in that direction all that time. Well, what are you to do? Are you to station an army along the boundary or the frontier, and say that civilization shall not go on beyond this point, and protect these Indians and the buffalo in their wild condition for ever; and say that this part of the fruitful earth shall remain for ever a forest and a waste? Is that what you are to do? Is that the dictate of civilization? No; you cannot do it, if you would. Civilization will press forward and drive out the Indian naturally in one way or the other. The only thing you can do is to deal with it gently and gradually, and protect the barbarian from violence and secure to him his subsistence as far as you can.

Lord Hannen. — Was there ever any law as to the protection of the buffalo or bison except that of the Yellowstone Park?

M. Cater. — No; none that I know of.

Senator Morgan. — No, none; except that.

M. Carter. — None of that kind; and the consequence is that the United States in dealing with that — it is true it is done by treaty; but what are treaties between a nation and these tribes of Indians who are not capable of giving consent? — they do not deserve the name of treat ies for what is it worth, — what is the effect of it? You take away from the Indian his hunting ground, and you have to support him by giving him rations. That is what is done, I suppose, in Canada. Well, here they occupy territories capable of producing vast quantities of wheat which the Indian will not cultivate. Then you must take it from him; and, if you take it from him, you have to give him rations to support him. That is done in Canada and in the United States, and wherever these barbaric tribes are treated with generosity and with justice. But the merits of civilization and the interests of civilization and the demands of civilization cannot be made to await upon the destinies or demands of these few Barbarians. That cannot be done; and when the question comes whether they are to be permitted to exterminate a race of animals like the seal, not for the purpose of supplying themselves but because they are the *employés* of men prohibited from doing it, then you must prohibit them also.

The President. — That is their livelihood as well, is it not?

M. Carter. — Of the Indians?

The President. — Yes, — their means of livelihood?

Mr Carter. — They have a right to pursue this livelihood as long as it is confined to getting the seal for the purpose of clothing for their bodies or for meat; but when they want to engage themselves in commerce, and clothe themselves in broadcloth and fill themselves with rum in addition to their real wants, then a different problem is presented.

Practically here it would be of no account. The only way in which they pursue or ever have pursued the seal is by in single boats going out from the shore, and in that way they can take a few seals that approach the shore more closely than usual; but it is pelagic sealing that threatens the existence of the herd, and that consists in a large vessel provided with

a dozen or more boats and a very large crew which follows the seals for 100 or 200 miles, and are capable of withstanding any weather and of continuing on the sea for months — it is the vessels which follow them up and put out their boats whenever they see enough seals to engage their attention and slaughter them in that way that threaten the existence of the herd. If sealing in boats from the shore were permitted, it would not occasion any serious danger, because no boats can go out and stay out all night; they cannot go out for more than a few miles, and they must be back before dark. It is only a few seals that they can take, and that would not threaten the existence of the herd. The attack which civilization makes upon it, and which it has no right to make is destructive of this seal, and that is by vessels with crews and boats which go on long voyages — it is that which is destructive.

Now the upshot of this suggestion about the right of the Indians to make these attacks upon the seal is this, that it does not create any serious difficulty with relation to the problem. Of course, it is not supposed that the United States are going to take away from these people their means of subsistence — at least, without supporting them in return. Their history abundantly repels any suggestion of that sort. They have never inflicted any such barbarity upon them, or, if necessary, their rights might be declared to be subject to it.

The President. — Is the sealing on the coast by Americans carried on by the Indians — I mean the pelagic sealing — or is it only by Canadians?

Mr Carter. — There is no sealing in boats from American territory, I think, because there are no Indians on American soil which are given to that pursuit.

Mr Justice Harlan. — When you speak of boats, you mean canoes?

Mr Carter. — Yes.

The President. — Yes, we understand that.

Mr Carter. — I have just been told that there is one tribe of Indians, at least — the Makah Indians, who are on American territory, and who do practice sealing in boats to a greater or less extent, and there may be others.

Now let me say in conclusion of my argument on this question of property, — and I am about to conclude it now — that I have endeavoured to put the case of the Government of the United States upon no selfish reasons or grounds particular or personal to themselves, but upon grounds of interest alike to the whole world. I have not put this property in seals as the peculiar property of the United States in the complete sense of property, but as the property in which all mankind is interested, all mankind having a right to enjoy it, all mankind seeking to enjoy it, but limited and absolutely limited to one method, and that is by the employment and instrumentality of the United States in this husbandry on the Pribilof islands.

The President. — You do not say that it is absolute property, but that it is property in the sense of article VI, do you say that?

Mr Carter. — It is properly in the sense that they are entitled to the exclusive custody and management of it, and to prevent interference in it in any quarter, but when you say property in the sense of beneficial interest and enjoyment, then I speak of the interest of the whole world.

The President. — So that according to you, this question No 5 : " Have the United States any right, and if so what right to the protection of property " — the property here would be a quatified property ? I am asking you to help us to solve the question which we have to solve. You have been kind enough to speak and give yourself a good deal of trouble to help us already.

Mr Carter. — Well, I shall not leave that undisposed of. It will come in due course of my argument, but if the learned President desires an answer now.

The President. — No, not if it will come in time; that is enough.

Mr Carter. — Yes, it will come in time.

We ask for nothing here which is not equal to the interest of all nations. We ask for nothing that is going to injure anybody. We ask only for that which enables the world to enjoy the benefits of this property, and to afford what we ask takes away nothing from anybody not even from these pelagic sealers, except the pursuing of an occupation of doubtful profit for a very few years.

In the allotment between the different nations of the world of the various advantages which the earth affords, this particular one happens to fall to the United States, and it is her duty to improve it and make it productive; and the performance of that duty will indeed be profitable to herself and rightfully so. And nobody ought to begrudge her that; but it will be equally advantageous to the whole world, and all she asks is an International Tribunal, representing the whole world, to award her the privilege of doing it. She has done it in the past, and is capable of doing it in the future if permitted to do it by the abstinence of the rest of mankind from a destructive pursuit of the animal. That is all she asks.

Now, assuming the right of property in this herd to be established in the United States, the next question is what right she has of defending and protecting herself in the enjoyment of that property. But that question, as I am to deal shortly with another aspect of the question of property (namely, with the industry that is established on the Island, dealing with the question of property irrespective of any right of property in the seals themselves), I shall postpone a discussion of the rights of protection and defence which the rights of property would give until I have concluded what I have to say on the aspect of the question which relates to the industry carried on the Island.

[The Tribunal then adjourned for a short time.]

Mr Carter. — There is one extract from the Report of the British Commissioners which I intended to read in the course of my argument as showing that a husbandry was possible with the seals, and that it is car

ried on upon the Pribilof islands. It is an extract from the Report of the British Commissioners on page 159.

Mr Justice Harlan. — What is the section?

Mr Carter. — Well, it is beyond the sections.

Sir Charles Russell. — It is a newspaper extract.

Mr Carter. — Yes, it is a newspaper extract.

The American fur-seal had a narrow escape of sharing the fate of its southern kindred. In a paper dealing with this subject, a writer gives the following account.

It is cited apparently for the purpose of approval.

Early in this century the seals were almost exterminated in many of the islands in the North Pacific, and were there as ruthlessly slaughtered as they were in the Bass Straits and the New Zealand coast. The extermination was, as it were, commenced, had not Russia first and the United States afterwards leased the exclusive right of killing seals on the Pribilof islands — a famous sealing place, — to a single Company, by which means the seals were saved, as the Company had an interest in keeping up the supply of furs.

This single experiment, the writer states, has proved conclusively that fur-seals can be farmed as easily as sheep, and that sealing should not be thrown open without restrictions. Seals are a property the State should jealously guard. On the two Pribilof Islands it is computed that 500,000 seals resort annually. These islands, from the value of the fur-seal, were discovered in the year 1786, when the slaugher commenced, and was prosecuted without.

And then there is an apparent blank :

Until the year 1839, when the number had been so reduced that the business threatened to be entirely destroyed within a few years.

The President. — Do you know where that paper comes from?

Mr Carter. — The substance of it is a newspaper extract.

Sir Richard Webster. — It is referred to in the letter upon page 158.

I inclose a newspaper copy (marked B) of a paper prepared and read by Mr Alexander Morton, F. L. S., one of the Tasmanian Commissioners of Fisheries.

Mr Forster. — A Report from Mr Morton as published by newspaper.

Mr Justice Harlan. — That is a reply to a circular addressed to the Government of Tasmania.

Mr Carter. — Yes.

The President. — Mr Morton is a British Official, is he not? But does that mean to say that the Bristish Government appropriates his views?

Sir Charles Russell. — No.

Mr Justice Harlan. — These were enquiries sent to Colonial Governments, as I understand it.

Sir Richard Webster. — On page 154, you will find that the British Commissioners sent a circular of enquiry to a number of Governments, beginning with the Cape of Good Hope, the Falkland Islands, New-South Wales, Victoria, Tasmania, New-Zealand, Chile, Argentine

Republic, Brazil, Uruguay, and Japan; and some replies were received, and they are set out.

Mr Carter. — And this one, as well.

The President. — But that intimates no approbation of the views. It is merely the point of view.

Mr Forster. — It is evidence.

Mr Carter. — It is a paper presented by the British Commissioners as having been received presumably from intelligent persons acquainted with the subject, and presented as something worthy of attention.

The President. — It does not mean approbation; but attention.

Lord Hannen. — It is presented as one of the Reports made to them, and which they dont keep back.

Mr Carter. — No; it is presented as something made to them.

The President. — And requiring attention, at any rate.

Mr Carter :

The destruction was then stopped until 1845, when it was gradually resumed, though, instead of the indiscriminate slaughter which had before been permitted, only the young males (two years old) were allowed to be killed. The rookeries continued to increase in size until 1857.

The Company who leased the right of sealing in these islands were restricted about the year 1860 to 50,000 seal-skins annually. From 1821 to 1839, 758,502 fur-seals were killed.

The President. — Is that all in accordance with your own information?

Mr Carter. — I will not say these particulars are in accordance with our evidence. The general tendency of them is in accordance with it; but that they are minutely in accordance with our own evidence, I do not undertake to say.

The President. — And it is not necessary.

Mr Carter. — No. I read them for the purpose of showing the conclusions of the writer or compiler of this information.

The United States Government, fearing their total extinction, leased the sole right of seal-fishing on these islands to one firm, restricting the allowed number to 100,000. From what he had been able to lay before the Fisheries Board, no time should be lost in at once taking steps to protect the seal fisheries in Bass Straits. Wherever proper restriction has been introduced a most valuable industry has been started in connection with the seal industry, and, instead of the three years; as has been proposed by this Board, he strongly recommended five years for the close season, and if at that time the seals have increased the Government might be recommended to lease the islands, allowing only a certain number to be taken annually, and on no account to allow the females to be killed.

I come now then to the other branch of the question of property, mamely, the property which the United States asserted in the industry carried on by them on the Pribilof Islands, irrespective of the question whether they have property in the seals or not. Supposing, for the purpose of argument, that my conclusions were not agreed to, that the United

States have a property in the seals themselves or in the seal herds which frequent those islands and assert that they have a property interest in the industry which is there carried on — a property interest of such a character that they are justified in protecting and defending it against any wrongful invasion of it in any place.

Now for the purpose of argument on that question, I employ the same bases of fact which I have employed in discussing that question of property in the seals and briefly not to go into it at large, I assume as facts these which are substantially undisputed.

That this industry was established originally by Russia, and she employed care, industry and devoted expense to the establishment of that industry, carrying thither a large number of native Aleuts from the Aleutian Islands for the purpose of guarding the seals and for the purposes of the market.

That no interference was made with Russia in the enjoyment of that industry during the whole period of her occupation down to the time when the islands passed into the possession of the United States.

That the United States continued to carry on that industry in substantially the same way and also without interference until the practice of pelagic sealing was introduced.

That the effects of that industry were in all respects beneficial not only to Russia when she engaged in it and to the United States after her possession began, but to the whole world in the manner I have described, and substantially it consisted in securing the entire annual increase of the animal, and devoting it to the purposes of commerce without diminishing the stock.

That by means of this industry, the stock of seals has been actually improved, and to show the beneficial effects in that particular, we have only to compare it with the fate of similar species of fur seals in the southern Ocean, in the Falkland Islands, in the Island of Masafuero, and elsewhere, where the stock of seals has been entirely destroyed. I might add it is quite possible that with the prohibition of pelagic sealing and with similar rules and regulations for the preservation of seals, those races, as far as any remain, and so far as any individuals of the race remain in the Southern Seas might be again induced to resort to those islands and those islands be again repeopled with those herds, and similar advantages enjoyed for the whole world which is now produced by the industry carried on in the Pribilof Islands. Those consequences, it is not unreasonable to suppose, might be brought about to a greater or less extent, and thus the usefulness of this animal be to a great extent increased, if all the resources were availed of.

The President. — Do you mean to say that that ought to be a matter for international consideration, or that a single nation by its municipal laws could bring about that result.

Mr Carter. — I mean this — if it was recognized that the seals were property, there might be an inducement to the nations who own the sove-

reignty of those islands to establish rulesand regulations, and pelagic sealing being prevented by an award of property to the sovereign of the place where they make their home, rules and regulations having regard to them might then be established, which would result in the increase of the herd.

The President. — That might be a result of this present Arbitration.

Mr Carter. — It might be a result of this present Arbitration. It is unquestionably one of the inducements or one of the considerations that should engage the attention of the Tribunal. It is a question not only of protecting the herds that now exist, but a question of making the natural resources of the earth available for their possibilities.

Now the industry thus established and carried on by Russia and now by the United States is unquestionably a full and perfect right. That is not disputed. It is a lawful occupation; it interferes with the rights of no one else; it is a useful occupation. It is useful to the persons who carry it on, and useful to the whole world. It has a further utility in the sense that it preserves those races.

It applies the full benefit of them to the benefit of mankind, and preserves the stock. It might be argued that it has in every aspect the highest degree of utility, and every form of a full and perfect right. That right is not disputed on the other side, What is set up against it, what is asserted against it is, that you have no right to prevent other indusiries which come in conflict with it. It is said that we also have an industry in the pursuit of these seals which is carried on by sea, that this is a lawful occupation, that this is a right just as much as yours is a right, and therefore you have no right to complain of it. That is the condition of things. Now, of course, the validity of that argument rests on the question whether it is a right or not, and therefore in every aspect of this discussion on the question of property or property interest, we are brought face to face with the question whether this pelagic sealing is a right. If it is a wrong, then, of course, there is no defence of it. If it is a right, then other questions may arise.

Well, upon what ground can it be defended as a right? What moral considerations rest underneath it and support it and sustain it corresponding to those which sustain the carrying on and supporting of this industry at the Pribilof islands? I know of none. I hear of none suggested. I hear of no consideration in the nature of a moral right suggested as a foundation upon which that so called industry of pelagic sealing can be sustained. The only grounds upon which I hear it put are two; first, that this is a free swimming animal, and, secondly, that the seas are free, and that there is no municipal power other than our own that can restrain us in the pursuit which we choose to carry on upon the high sea. Well, that argument rests, therefore, upon the assumption that there is a right to destroy any free swimming animal in the sea, however great the blessing of that animal may be to mankind. However useful he may be, still we have a right to destroy him. We have a right to pursue him and take

him, and apply him to the purposes of commerce, though that pursuit results in his destruction.

That is a proposition which, in my judgment, cannot stand a moment's consideration. You have no more right to destroy a free swimming animal than you have to destroy any other animal. You have no more right to sweep from the face of the earth by practices upon the sea than you have by practices upon the land. If you are using only and taking only the increase; then you may have a right; but, if you are destroying, then the foundation of your right is gone. To be sure, there are many animals, free swimming animals in the deep, such as fish, the herring, the cod, the mackerel, which you cannot take except by indiscriminate pursuit. You cannot in any other way appropriate them to the use of mankind. Mankind must have them in that way, or do without them altogether; and, therefore, in such case the indiscriminate pursuit of them on the high seas is right enough.

That is the only way in which mankind can enjoy them, and, as I have before remarked, Nature in these cases by the enormous provision which she furnishes of such animals supplies prevention against their destruction and furnishes barriers against it. But here is an animal which can be taken and applied to the use of mankind without diminishing the stock; and when that is the case, you have no right to adopt a mode of pursuit which does destroy it and sweep it from existence.

The President. — Is there no other mode of fishing for free-swimming animals in the sea which is not recognised by certain usages which may bring in a selection, so that the stock may not be exhausted? Herring and Cod seen not to be exhaustible as yet; but I enquire if there are not certain rules as to other species than the seal?

Mr Carter. — I know of no rules as to these great tribes of fish that inhabit the high seas generally and are found there. I know of no rules that have been, or can be, applied for the purpose of preventing their destruction.

The President. — If I understand, you imply that selection is one of the grounds of the right of property in this present case?

Mr Carter. — It is.

The President. — Selection of those slaughtered.

Mr Carter. — Yes; selection is necessary in the case of the seals.

The President. — And one of the foundations of the right of property in the seal?

Mr Carter. — Certainly; it is one of the foundations of the right of property in the seal that selection is necessary, and indiscriminate slaughter is destructive and, therefore, not right, provided there is a mode by which you can select the victim for slaughter; and if you can select the victim for slaughter and if there are some men who, in consequence of the natural advantages which they enjoy, have such a control over the animal that they can make the selection, that constitutes the foundation of their right of property. That is what constitutes it. Of course, they have

the right of property — (Take the Pribilof islands, for instance) in the seals so long as they are on the Islands and in their possession irrespective of this but I am speaking of the right of property on the high seas outside the jurisdiction of the nations, — then the main foundation of the right of property is that they can gather all the use of the animal and afford it to mankind without diminishing the stock.

Mr Phelps. — That is a foundation.

Mr Carter. — And it is the principal foundation.

Senator Morgan. — If the United States have a right of property, as fully as property can be enjoyed, in fur-seals while they are on the land, is that lost by their migration into the ocean? Is not that a phase of the question ?

Mr Carter. — That depends on the same considerations that I have been mentioning.

Senator Morgan. — So I understand.

Mr Carter. — That depends on these very considerations. The fact that they have a right of property on the land, — the fact that they have a possession on the land and control, and the fact that that control and possession give them the power of taking the animal and furnishing him to the use of mankind, is a ground, and a sufficient ground, upon which they should be awarded a property in the animal, not only while there, but on the high seas also.

Senator Morgan. — The condition you have adverted to, as I understand your argument upon the right of property is this, does the right of property follow the migration of the seals?

Mr Carter. — It does.

Senator Morgan. — It is not required to re-establish it when you get into the open ocean on a different principle.

Mr Carter. — How we can protect it, is a different consideration; that I shall deal with hereafter.

Senator Morgan. — I did not so understand it; but you have no cause to establish it upon the Ocean after you once have established it upon the land. Is that your contention?

Mr Carter. — After you have once established it on the land, the considerations I have adverted to extend outside the jurisdiction and on the high seas.

The President. — But Mr Morgan asked it you meant full property. That is what I asked before, when I asked if you meant qualified property.

Senator Morgan. — I meant property under any of these conditions. I do not admit the doctrine that there is such a thing as a qualified property in seals. It is either property, or not property.

Mr Carter. — Well, I admit the doctrine of a qualifed property, myself. In the case of animals commonly designated as wild, such as bees, and wild geese and swans, and deer and all that, the property of man is qualified as long as they have the instinct of returning, evidenced by their habit of returning, — as long as that habit is preserved, the property subsists

and it subsists as well while they are out of the possession of the owner as while they are in his possession. But when that instinct is lost, then the property in lost. That is what I take to be the doctrine of the law.

Senator Morgan. — If there is a difference between you and myself, Mr Carter, it is only in the meaning of a word. I think when a property has been acquired in an animal, or any other thing that is capable of enjoyment in the sense that you have presented it, it may be lost upon conditions subsequent; but, while it is your property, it is not a qualified property.

Mr Carter. — It is perfectly true in that seuse; but it is qualified in the sense only that it may be lost because it abandons its intention of returning; but, while it subsists, it is full and absolute. That is all I mean.

Senator Morgan. — Yes.

Mr Carter. — Now in reference to the seal, it always exists, because confessedly the instinct never is abandoned, it always remains.

The President. — In every individual of the herd.

Mr Carter. — Yes, in every individual of the herd that instinct to return is never lost.

Now I say we are met face to face with the question whether this pelagic sealing is right or not. There cannot be any right to destroy any free-swimming animal, provided there is another way by which it can be taken which does not involve destruction. I next have to say what I have all along insisted upon, and which constitutes one foundation of the claim of property on the part of the United States in seals, and supports their claim to property interest in this industry as well that they are performing a duty which they owe as a nation to mankind; that is, they are cultivating and making productive an advantage which in the partition among nations of the blessings of the earth has fallen to their share. How is it with this pelagic sealing? Have they any peculiar advantage? Have they the power of preserving this race of seals for the use of mankind, and is there consequently any corresponding duty arising in the case of any nation to prosecute pelagic sealing? None whatever. It is just the contrary. It is mere destruction.

Now the other ground upon which they seek to maintain it as a right, is, that the seas are free. They say that the seas are free, and you cannot interfere with us on the high seas, and inasmuch as you lack the power of interference, therefore the inference is that our industry is a rightful one. That does not follow by any means. Whether a thing is right or not depends on the moral considerations on which it stands, not on the absence of any means of punishing it. There are a great many things which may be carried on with impunity upon the sea, because there is no municipal law extending there to prevent and repress them; but that does not by any means give to them the character of a right. The distinctions between right and wrong are not abolished when you go upon the high seas. Those distinctions prevail the world over wherever men go, and there

is no part of the sea, in our view, which is not under the dominion of law, and where you cannot determine by an investigation into the character of the act itself, whether it is right or wrong. Therefore to say that the seas are free, because you cannot punish us for doing this thing, and to say that that constitutes a right is to make an assertion which has no foundation whatever in moral or legal reasoning.

Of course in saying that the practice of pelagic sealing is a wrong, we do not insist that the United States Government has a right generally to repress it, the United States Government does not assume the office of redressing wrongs all the world over, whomsoever they may affect, but when then see that a property interest of theirs, or a right to carry on a lawful industry, is interfered with and injured, and its destruction threatened by an act upon the high seas, which is in itself a wrong, then they have a right to interfere and defend themselves against that wrong.

Now, there are two foundations upon which the right to this industry which is carried on at the Islands is maintained by the United States, which have quite a close resemblance to each other and yet in certain particulars are distinct.

The first is that the industry is made possible in consequence of a particular natural advantage which attaches to the soil of the United States at this spot, that advantage consisting in the fact that this race of animals regularly resorts thither, spends a considerable portion of its life there, and so far subjects itself to the control and power of man as to enable him to carry on a husbandry in relation to it. Its right therefore in that particular is founded on a natural advantage peculiar to the spot, and which is as much the right of the nation as any advantage connected with any part of its soil.

The other foundation upon which it rests is that it is a national industry which cannot be broken up by the wrongful attacks and assaults of individuals of other nations not engaged in carryng on a national industry.

I called it a national industry for this reason. It is an industry which requires the establishment of rules and regulations in order that it may be sucessfully carried on which rules and regulations cannot be efficiently established and carried into effect except by the authority of a nation.

Senator Morgan. — Mr Carter, do you apply that to all the fur-seal fisheries in the world ?

Mr Carter. — Well, I am not making that application now. I am only speaking of these Pribilof islands; under similar circumstances that would exist in any other part of the world I suppose, but my argument is confined to these conditions.

Senator Morgan. — My suggestion prompts the inquiry whether the fur-seals being so valuable and tempting to the cupidity of man could be preserved anywhere in the world except through national authority.

Mr Carter. — Well I suppose they cannot be — that is the very argument I am putting here. Aside from the mere local advantages I call it an

industry which requires the establishment of national authority, the power of national authority in order to successfully carry it on.

The President. — To continue the hint of my learned Colleague I suppose you would make a difference between domesticated seals and wild seals, like we make a difference between wild bees and domesticated or appropriated bees. Would you do that? You would say that the Pribilof islands seals are domesticated seals and become the property of a private individual or a national individual so to speak.

Mr Carter. — Well, sir, I have now considered the question of property in the seals themselves and have done with that. I now come to the consideration of the question of the right of the United States to carry on its industry even if they were not property. These local advantages still remain, however, in this aspect of the case and they constitute a means by which this industry can be carried on there. They make it a rightful industry. Now I want to add to that, perhaps it is not necessary to it, but another foundation for it, that where a nation has created an industry by the aid of rules and regulations which it has established, and brought in a population upon its shores to engage in that industry so that the destruction of that industry would deprive them of an important means of subsistence, that the citizens of another nation cannot in a temporary and fugitive way, and for some temporary and exceptional benefit, come in and break up that industry. That is what I mean. Let me illustrate that : Assume that there are races of fishes which regularly visit a shore. They are not the property of the nation which holds dominion over that shore, but nevertheless it is possible by making rules and regulations and enabling them to build up an industry in reference to the taking of such fish when that is done and the industry is completed and the population employed in it and all their resources engaged in it, that is a thing, a creation which that nation has a right to maintain against the individual assaults of the people of other nations.

The President. — It would create a right of protection.

Mr Carter. — Yes, it has a right to protect.

The President. — It would create a right to protection upon the species which are the foundation of the industry. That is what you argue now. You have done with property ?

Mr Carter. — Yes, mere property I have done with. This would give a right of protection. The right of protection stands on the industry which is created, not a right of property in things. Writers in speaking of the law of property, say property has many forms, as we well know. Sometimes it is a full and exclusive right to the disposition of the thing — the fullest sort of property. Sometimes it may consist in a mere lien on a thing, as in the case of a pledge. Sometimes it may consist in a right to go upon the property of another person, as upon his land, and do something there, which is still a right. Sometimes it is a right to carry on a particular industry which the law defines as *jus meræ facultatis*; but it is nevertheless a right, and it is a right in the nature of property also.

Now I want to give some illustration to show what I mean by these rights to carry on an industry. These Pribilof Islands are one and a most striking illustration of it. There are many others that are given in our case, many instances in which nations of the world or colonies of different nations, having a right of legislation, have passed laws for the purpose of protecting fisheries and other industries, which are carried on in the seas, against invasion, laws destined to regulate those industries and preserve them.

There are many different instances of that sort; many instances where Great Britain has passed laws of that character. They all proceed on the assumption that lawful and useful industries can be created and preserved by means of the exercise of national authority in that way. Whether this authority is susceptible of being asserted against the citizens of other nations, or only against the citizens of the nation by whom the laws are passed, is another question; but the motive of the laws, the details upon which they are based, in all instances is the same.

Now, I have instanced the Pribilof Islands. Take the fisheries on the banks of Newfoundland, which are also another illustration of that. I will not say that they are a full and perfect illustration, but they will answer for the purpose of my argument. Great Britain asserted, at an early period, an exclusive right to the fisheries on the Newfoundland Banks because she had created a national industry which was engaged in, and sustained by her subjects resorting to those banks for the purpose of gathering fish. And she claimed that the carrying on of that industry was a property of hers. Upon the United States gaining its independence, the United States asserted a right to participate in those industries. They said, "We were a part of Great Britain originally, and, indeed, were the people who went there and created this industry; but, having gained our independence, we have not lost our right to carry on this fishery". That right was denied, and an attempt to exclude them was still maintained, it being admitted on both sides that it was an industry to which each nation had a peculiar claim, Great Britain insisting it was her own and that the United States had no right to it, and the United States going on the ground that it was a national industry, and that they had a right to participate in it, because they were one of the original creators of it. There are numerous other cases of laws passed by Great Britain for the purpose of protecting the herring Fisheries, and so on.

The President. — Are those fisheries exclusive of other nations than American and English?

Mr Carter. — I do not think they are practically asserted now as being exclusive of other nations; but they were originally, and there were contests with other nations for the possession. They tend to illustrate my argument only; in the particular case they were not defensible, but they illustrate the view. The correspondence is printed in our argument which fully supports it.

The President. — But if the exclusive right was not maintained?

Mr Carter. — It was maintained for a while; but I do not think it has been maintained down to now.

Mr Phelps. — It is asserted now by the United States under the treaty of 1783; but the whole correspondence is in the argument on the case.

Mr Carter. — Now, there are other instances which proceed upon the same bases; the pearl fisheries of Ceylon are an illustration.

The President. — I suppose you do not assert the right of protecting ou the islands alone? Your argument at present goes to the right of protecting beyond the limits of the islands?

Mr Carter. — Yes, beyond the limits of the islands. My argument is this. We have the right to carry on the industry at the particular spot; and, having the right to carry on the industry at the particular spot, if the carrying on is prevented by acts in other places, even on the high seas, we have the right to protect ourselves by repressing those acts there. That is what I understand to be our right.

Now the pearl fisheries of Ceylon are another instance. The coral beds in certain parts of the world are protected by the laws of the nations which are contiguous to them, and they are protected in some cases exclusively for the interests of the citizens of those nations.

Now we have cited or referred to in the American case a great number of instances in which laws have been passed for the purpose of establishing and preserving, and in order to establish and preserve the government and regulations of fisheries and other pursuits carried on on the high seas, a great many such instances.

Now the general answer to that which Great Britain makes is that these laws, whether they are the laws of sovereign states or of colonial dependencies, are designed to be operative only upon their own citizens, and are not aimed at the practices of other nations; that they do not therefore furnish any support for the assertion that the carrying on of industries such as I have described may be asserted as a right against the citizens of other nations. They are only designed to regulate the action of citizens of the nations by whom the laws are made. Such is the position upon the other side.

I am not going to go through the particular instances in which that has been discussed. It would occupy altogether too much time. I am going to dispose of the question by a shorter process of argument.

I suppose in general that these regulations where they are not in terms limited, as they sometimes are, to the citizens of the nations by whom the regulations are passed, are rules designed to be operative upon the citizens of all nations ; otherwise they would not be protected, and otherwise they would serve only to open an opportunity for a more full enjoyment by the citizens of other nations of such rights, without the competition and rivalry of the citizens of the nation by whom the regulations are passed, which I do not suppose to be intended. But there are some of these laws and rules which protect these industries upon the high seas, which are admitted by the learned counsel for Great Britain to be opera-

tive on the citizens of other nations, and they are therefore called upon to explain those instances. What are they, and how are they so explained. Turning to the argument on the part of Great Britain, at page 59, we find this.

It is next submitted.

That international law recognises the right of a state to acquire certain portions of the waters of the sea and of the soil under the sea, and to include them within the territory of the state.

This affords a legitimate explanation of the cases of foreign extra-territorial fishery laws cited by the United States, quite apart from any question whether they apply to foreigners or not.

But it affords no justification for, nor are they analogous to, the Alaskan Seal Statute, as is contended by the United States.

The territory of the nation extends to low-water mark ; but certain portions of the sea may be added to the dominion. For example, the sea which lies *inter fauces terræ*, and, in certain exceptional cases, parts of the sea not lying *inter fauces terræ*.

The claim applies strictly to the soil under the sea. Such claim may be legitimately made to oyster beds, pearl fisheries, and coral reefs ; and, in the same way, mines within the territory may be worked out under the sea below low-water mark.

Isolated portions of the high sea cannot be taken by a nation unless the bed on which they rest can be physically occupied in a manner analogous to the occupation of land.

These principles, though they explain legitimately all the examples of foreign laws dwelt on by the United States, show also that no right to, or on so vast an area of the high sea as Behring Sea can be acquired. Nor has any such claim ever been made.

Now we have it admitted here that it is competent to particular nations to assert a right of property in oyster-beds, pearl fishery beds, and coral-reef beds, and to assert a right of property in them, although they are out upon the high seas beyond the territorial three-mile limit and to assert those rights against the citizens of other nations.

Now they are obliged to make that admission for it is impossible to examine the various statutes which have been passed by independent States or Colonies protecting fisheries of the character thus mentioned without recognizing the fact that they are designed to apply to the citizens of all nations, that they are intended to be enforced and are actually enforced against the citizens of all nations. Well what is the assertion there? The assertion is that the State has, by the operation of its rules and regulations created a national industry in respect to those fisheries, oysters, pearls and coral, an industry that it is justified in protecting from invasion against the citizens of all other nations though it is on the high seas.

The President. — That does not seem to be quite the contention of the argument in the print before us.

Mr Carter. — I don't so understand it.

The President. — It is founded in the right of occupation as it seems, not of industry.

Mr Carter. — I am going to see what they put it upon. I am going

to discuss that; but no doubt they assume that there is a right on the part of particular nations to protect against the invasion by other nations of the sea outside of the three-mile limit, I know they base it upon the right of property, and I will come to that particularly, but the thing itself that they assert, and that is what I assert — I assert that a nation has a right to establish an industry of that sort and to protect it against invasion by the citizens of other nations. Now they undertake to place a limitation upon the right and to suggest reasons upon which the right is founded. I want to enquire into the validity of that limitation and into the validity of those reasons. What do they put it upon? They say it is a right to the bottom. It is a property right to the bottom, and it exists wherever the bottom may be occupied, and does not exist where the bottom cannot be occupied.

Well, that amounts to this, then, that, wherever the nation can occupy the bottom of the sea, although it may be outside of the territorial limits of that power, it may rightfully occupy it. That is the stress of that argument; and, if the argument is sound, there is no part of the sea which a nation can occupy the bottom of, that it may not assert a peculiar right in itself to. Well, how can you occupy the bottom of the sea? You can occupy it by taking such possession of it as you can take, — you can go and buoy out 100 square miles where you can reach the bottom and establish a force there and exclude the citizens of other nations from it. You can do that thing, no doubt; and that is all the occupation of the bottom which you can make. The assertion, then, on the part of my learned friends is, that, wherever you can take possession of the bottom, you can exclude other nations from it. Well, that goes much further than the argument of the United States in any part of it, — goes to support an occupation of the sea outside of the three-miles limit. We do not assert anywhere the right to go and take possession of the bottom of the sea in that way at our pleasure; nor do we suppose that any such right exists; but that is their assertion, and if it be true, you can take possession of the bottom of the sea anywhere.

If there is a particular piece of coast anywhere off Great Britain 20 miles out, where there is slack water which you can easily reach, that you can buoy out and define, and that is particularly favourable for carrying on the cod fishery or herring fishery or other fishery, that you can go and buoy it out and exclude the possession of the citizens of Great Britain or anybody else from it. If the bottom theory has any validity or foundation to it, you can do that. If it rests only on the ability to occupy the bottom, then you can establish it wherever you can reach the bottom, and if you can establish it in one place, you can establish in another.

I do not suppose it is possible to defend any such right as that over the high seas. I do not suppose it is possible to defend any such right as that over the fisheries of the seas. There must be some other principle that must be called in to play.

Now it asserted in reference to oyster beds, coral beds, beds where

the pearl fishery is carried on, beds which are found in a certain proximity to the coast of a country which can be carried on more conveniently by the citizens of that country than any other.

We practically find it exhibited in those instances, and in those instances we find rules and regulations passed for the purpose of securing the perpetuation of the product of the seas, and designed to make them more useful. Those are the cases in which it can be done, and in those cases it is perfectly justifiable. It is there where there is a natural advantage, within a certain proximity to the coast of a particular nation, which it can turn to account better than the citizens of any other nation. It enjoys in respect to it, peculiar advantages growing out of its proximity, and where, if it is permitted to establish and carry out a system of national regulation, it may have the effect of producing a product of the seas, a regular, constant supply of a certain product of the seas, for the uses of mankind, but which, if it were thrown open to the whole world would be destroyed. That is reasonable. That stands upon the principles which I have been asserting. That is a solid foundation ; but it does not rest upon any mere right of reaching the bottom. It rests upon the fact that here is a natural advantage, a peculiar locality, offering particular advantages which, if improved, lead to the cultivation of a useful and profitable industry, useful to the nation, and useful to the world.

Under those circumstances, if one nation is permitted to cultivate undisturbed that natural advantage, free from the invasion of others, that industry can be profitably carried on, but if all come in, it is broken up. In such cases, therefore, the nation which enjoys this advantage says to other nations, rightfully : here is an advantage which Providence has placed within our reach, rather than in yours. We can turn it to account; you cannot.

We can use it so that it may produce its natural advantages. In order to do that, it requires regulation. It must not be used at all times. It must be allowed certain periods of rest. The animals which form the basis of it are at one time of the year breeding, or at one time of year engaged in this occupation or that. There are times when the industry should be pursued; times when the industry should be closed. All that cannot be accomplished without national regulation. We have done that. We have created an industry. There is a particular population of ours that are devoted to the work. Now, you must let us do it. It is not reasonable, it is not fair, it is not just, that you should come in here after we have created this advantage and despoil it, just for a temporary gain. You will not come habitually; you will only come occasionally; and you will interfere only for the purpose of ruining us, without doing any advantage to yourself.

Senator Morgan.— Mr Carter, in point of fact, are these Ceylon pearl fisheries and the coral fisheries of which you spoke held subject to the right of free navigation to commerce?

Mr Carter. — So I understand. I do not understand that commerce

can be prohibited over them. Oh no; surely not. There is no occasion to prohibit commerce. It is only the regulation of the industry that is insisted upon.

So I have to say that upon conceded principles there is a right in a nation to protect an industry for which it has natural advantages, and which it can create, preserve and improve by means of rules and regulations which it alone has the power to adopt and to enforce. It is conceded that this may be done in the cases to which I refer of the oyster beds, the pearl beds, of the coral rights; no matter how far they are out from land, wherever they are. If they are so situated as to be the special advantage of a particular power, and that particular power chooses to improve that natural advantage by the creation of an industry, they establish a right which they can defend from invasion by the citizens of other nations. The explanation of that which is attempted to be made is that it depends upon an ability to occupy the bottom. That does not explain it. That furnishes no ground of reason whatever. If it were true, it would justify the occupation of a portion of the bottom in any place in the seas, irrespective of the question whether there was a natural advantage or not; and that right to occupy the bottom certainly does not exist. Nor can you occupy the bottom of the sea. It is not susceptible of occupation, unless the law should choose to come in and say that it should be deemed to be the subject of exclusive occupation; and as I have already, I think, sufficiently shown, the law will not do that merely to gratify the whim or the ambition of any particular individual or any particular individual or any particular nation, but only for the accomplishment of some great social good.

That right of establishing a national industry based upon peculiar natural advantages, and based sometimes upon the mere circumstances that it has been created by rules and regulations, is one that is fully established, in reference to many of several different products of the sea.

In the protecting of industries of that sort, does the nation extend its jurisdiction over those places? Does it make them a part of its territory? Certainly not. It has no right to do that. It is not consistend with the law of nations that it should do that. There is no occasion for it to do that. There is no need of it. All that it is necessary for it to do is to enforce such regulations on those places as are effective and sufficient to protect the right from invasion by the citizens of other nations.

Now let me bring the case of the seal fisheries on the Pribilof Islands before the attention of the Tribunal, and compare them with the doctrine thus established. What natural advantage have they? One of the supremest sort; and an advantage, indeed, not at the bottom of the sea, but an advantage, on the dry land above the sea which is within their admitted jurisdiction. By the creation and carrying on of this industry here, they have established a business profitable to themselves, supremely useful to the whole world. Shall they not be able to protect it from

invasion? If the coral beds can be protected from invasion away out at sea, if the pearl beds can be protected from invasion by municipal regulations, why should not this fishery be protected in the like way? It requires no greater exercise of authority. It requires no straining whatever of the ordinary rules which govern the conduct of nations in respect to their interests. It is a more particular instance, by far, than the case of the coral beds or the pearl beds or the oyster beds; a more particular instance by far for the application of the principle that the nation may protect an industry which has thus been created.

To make it entirely analogous, if these seals were in some manner attached to the bottom, if they were in the habit of congregating at some particular place on the bottom of the sea, then, according to the doctrine which seems to be put at the foundation, the United States would have a right to go out and take possession of that bottom, incorporate it into its own territory and treat it as a part of its own nationality.

I am sure we assert no such right as that. We do not ask to go any such length as that. All we ask the right to do is to carry on the industry on our own admitted soil, and to protect it from being broken up by acts which are in themselves essential wrongs upon the high seas.

Let me defend these particular instances of the coral beds, the pearl beds and the oyster beds upon the same principles that I have defended the assertion of property interest not only in the seals but in the seal industries. In all those cases there is a peculiar natural advantage connected with those places and belonging to the nations which lie in most near proximity to the places where they are situated. In the next place, they are exhaustible. There is not enough for all; and therefore there arises an occasion when you may assert the right of property on the principles which govern the laws of property. In the next place, if left open to the unregulated invasion of the citizens of all nations, they would be used up and destroyed. The only condition upon which they can be preserved and made beneficial to mankind is that they be allowed to be worked and operated by the particular power which has the best facilities for that purpose. In the next place, they can be preserved only by putting them under a system of regulation, which shall be operative even upon the citizens of that power.

It is necessary that the citizens of the particular power whose citizens go out there and improve and occupy these places should be also made subject to these regulations. In other words, the general condition is presented that mankind may have the benefit of these advantages if they are disposed of in this way, and not otherwise; and consequently they are disposed of in this way. The bottom of the sea in these places is not made the property of the particular powers who assert the right to the industries. It is not their property at all. It is not within their sovereign jurisdiction at all, any more than any other part of the high seas; but it is a theatre where their defensive regulations may be put in operation, and where the rights of their citizens may be defended.

Let me support these views by a reference to the opinions of the best writers. I read from Puffendorf on the Law of Nature and Nations. The extract is found on page 134 of my argument :

As for fishing, though it hath much more abundant subject in the sea than in lakes or rivers, yet'tis manifest that it may in part be exhausted, and that if all nations should desire such right and liberty near the coast of any particular country, that country must be very much prejudiced in this respect; especially since'tis very usual that some particular kind of fish, or perhaps some more precious commodity, as pearls, coral, amber, or the like, are to be found only in one part of the sea, and that of no considerable extent. In this case there is no reason why the borderers should not rather challenge to themselves this happiness of a wealthy shore or sea than those who are seated at a distance from it.

Expressing precisely the views that I have endeavored in much less appropriate language to express.

And then from Vattel upon the same subject :

The various uses of the sea near the coasts render it very susceptible of property. It furnishes fish, shells, pearls, amber, etc; now in all these respects its use is not inexhaustible. Wherefore, the nation to whom the coasts belong may appropriate to themselves, and convert to their own profit, an advantage which nature has so placed within their reach as to enable them conveniently to take possession of it, in the same manner as they possess themselves of the dominion of the land they inhabit. Who can doubt that the pearl fisheries of Bahrem and Ceylon may lawfully become property? And though, where the catching of fish is the only object, the fishery appears less liable to be exhausted, yet if a nation have on their coasts a particular fishery of a profitable nature, and of which they may become masters, shall they not be permitted to appropriate to themselves that bounteous gift of nature as an appendage to the country they possess, and to reserve to themselves the great advantages which their commerce may thence derive, in case there be a sufficient abundance of fish to furnish the neighboring nations?... (Sec. 288). A nation may appropriate to herself those things of which the free and common use would be prejudicial or dangerous to her. This is a second reason for which governments extend their dominion over the sea along their coasts; as far as they are able to protect their right.

Now, upon that very firm basis of reason and authority, we place the right of [the United States to protect herself in the enjoyment of the industry which she has established upon these islands. She has peculiar advantages, supreme advantages, for appropriating the annual increase of the seal, without diminishing the stock. She has established an industry and covered it with rules and regulations which are desired to preserve it, and to make this blessing perpetual, to mankind. The seal is exhaustible. There is not enough for all; and she is entitled to challenge for herself the benefits of this industry in consequence of these advantages, and in consequence of the steps which she has taken to improve them.

I cannot think that there is any sound answer to an assertion of the right of a property interest placed upon that basis, and that irrespective of a property in the individual seals.

That concludes my argument upon this question of the property inte-

rest of the United States in the industry established upon the island, irrespective of a property interest in the seals.

I now pass to the consequences of the establishment of those rights, so far as they involve the question, what acts the United States may do for the purpose of protecting herself in the enjoyment of the rights thus acquired and established.

I must assume, in the first place, that if she has the right to the exclusive enjoyment of this industry of taking seals in consequence of her natural advantages and of the exhaustible character of the product, she has a right in some manner, she must have the means in some manner, to enforce that right. Otherwise we should be talking to no purpose. What is a right as to which there is no means of enforcing it? It is mere words. It amounts to nothing at all. There is nothing substantial about it. Such things are not the subject of discussion. When it is said that a man of a nation has certain rights of property, it means that they have some rights which can be enforced in some manner. How shall they enforce them? That is the question. What acts will the United States do? Can they extend their sovereignty over the seas to an illimitable extent wherever it may be necessary to protect the right? No ; it cannot.

We make no assertion of that sort. We could not substantiate it if we did. The territory of a nation, the sovereign jurisdiction of a nation is bounded by her territory, with an additional limitation which extends to a certain qualified extent her sovereignty to a distance commonly taken as three miles. Beyond that the sovereign jurisdiction of the nation cannot be extended. Beyond that her laws, as laws, have no force or operation. Beyond that, her powers as a legislative power have no effect. The emanations of her legislative power do not extend as exercises of legislative power beyond her territorial jurisdiction. All that we take to be admitted.

Sir Charles Russell. — You mean as against those who are not subjects or citizens?

Mr Carter. — Yes ; against those who are not subjects or citizens. That is what I mean. If her legislative power extended over the sea, she would have a right, of course, to legislate for everybody that came within the limits of that legislative power. We make no such pretension as that. This supreme legislative jurisdiction must be bounded necessarily by some line, and that line is, for the boundary of her absolute legislative jurisdiction, high water mark. It does not go beyond that, although she may extend it, for most purpose over a further space which is commonly taken to be — I do not mean to say it is absolutely limited to that, but is commonly taken to be — a distance of three miles ; but even there her legislative power is not absolute, for she cannot exclude the passage of foreign vessels over her waters. She cannot, as she can generally do with regard to her territory, exclude foreigners from it. Over the land she has an absolute power of exclusion ; but over these territorial waters,

although she may generally extend her legislative power, she cannot extend it so far as to exclude foreigners from then. Her right to protect it is not derived from that. Where do you get it then? How does she acquire any right to protect it? She as a right to protect it, just as any individual has a right to protect his property where there are no other means, — by force ; not by the exercise of legislative power, but by the exercise of executive power, an exercise of natural power, by an exercise of what you may call force. That is what it means. Individuals can defend their rights and property by the employment of force to a certain extent. If a man attacks me, I may resist him and subdue him and practice violence upon him for that purpose ; and I may go as far as is necessary for that purpose ; not farther. Whatever force it is necessary to employ to defend myself I may employ against him. So if a man comes upon my property, I may remove him, if I have to carry him five miles; and I may employ as much force as is necessary for the purpose of removing him from my property; but I cannot employ any more force than is necessary.

Those rights of self-defence and self-protection survive to individual man even in civil society, but we may not go any farther than that. For the protection of rights, members of a civil municipal society appeal to society itself. They appeal to its courts for protection. They appeal to the judicial power, and that furnishes a remedy. What can nations do? Is there any court to which they can appeal? No ; they cannot make any such appeal as that. There, is no Tribunal into which one nation can summon another nation and get judgment, What can they do ? They can only use this same sort of self-defensive power that an individual does. That is all. That they can use to the fullest extent, and under all circumstance, limited however by the same rules and by the same boundaries which limit it in the case of an individual necessity. Whatever is necessary to be done by a nation for the protection of its rights, it may do, and it may do it as an individual, and it is no exertion of its legislative power at all.

We may make that very plain and palpable by alluding to admitted instances of the exercise of it, and take what are commonly called belligerent rights. Here is a nation engaged in war. It blockades the enemy's ports. Here is a neutral nation, friendly to both parties which undertakes to enter that blockaded port, and the belligerent that has established the blockade captures her by an exercise of force, carries her into one of his own ports and confiscates her and sells her. What kind of an exercise of power is that? Not legislative power, certainly. That act was commited on the high seas, and outside of the jurisdiction of any power. It therefore was not legislative power. It did not operate to extend the jurisdiction of the nation over such a place as that. It was simply and solely an act of reasonable and necessary force employed for the purposes of self-defence. The nation had the right to carry on the war. Its existence perhaps depended upon its ability to subdue its adversary. It could not carry on the war succesfully unless it

had the right of shutting up, blockading the port, and therefore the necessary purposes of self defence gave it the liberty to seize the ship of another power, carry it into port and condemn it.

That is not legislative power. It was not exerted by reason of any extension of the sovereignty of the nation over the seas. It was simply an exercise of self-defensive power, standing upon the principle of necessity and limited by the principle of necessity. Wherever the necessity exists that power exists. I instance the case of blockade. There are other instances of belligerent rights.

The President. — You would not admit of that power in times of peace?

Mr Carter. — That is another question. Whether you may exercise a power of that sort in time of peace is a question to which I shall presently come. What I am talking to now is the character of the act. It is not legislative; that is certain. It is an act of self defensive power.

There are many instances of it in the case of belligerent rights. Take contraband of war. Of course you can capture a vessel that is carrying contraband of war, upon any of the high seas. You can enter even the territory of a friendly state, if it is necessary for the purpose of protecting your self against your adversary; and even when there is no condition of war. They had a rebellion in Canada some years ago, and some vessel was fitted out by persons making use of the soil of the United States for the purpose of aiding the rebellion, as it was called. A British military force crossed the Niagara River, captured that vessel right in the terrritory of the United States — not on the high seas but right in her territory.

Senator Morgan. — You refer to the " Caroline "?

Mr Carter. — I refer to the case of the " Caroline ". There was a conflict between Great Britain and the United States upon that point as to whether Great Britain in fact had the right to do that; but the conflict was not upon the point of principle at all, it being admitted on both sides that if there was a necessity for doing that act Great Britain was right in doing it; that if there was a well-grounded apprehension that that vessel was going to proceed across the river and engage in enterprises hostile to the authority of Great Britain in Canada, she was justified in doing that.

A celebrated instance in history was the seizure by Great Britain of the Danish fleet in the harbor of Copenhagen. There was a fleet of a friendly power. There was absolute peace between Great Britain and Denmark; but Great Britain was apprehensive that that fleet would fall into the possession of France. She considered so; and the seizure was defended by her ablest statesmen on the ground of necessity. This necessity of nations when it appears must have its way; and the inconvenience the trouble, the damage, the loss which individual citizens of another nation may occasionally suffer in consequence of these exertions of self-defensive authority cannot be taken into account.

The President. — Do you not think that all of that takes us out of this sphere of law and right?

Mr Carter. — Not at all. We are right within the sphere of law and right.

The President. — I do not think the whole world generally considers it so.

Mr Carter. — We are right within the sphere of law and the exercise of these acts of self-defensive authority, the extent to which they may go, the necessities which create them, how far the necessities extend — constute a great chapter in international law and are all dealt with, all their limitations defined, the principle which govern them laid down.

That is another of such acts of authority. They are self-defensive acts. What is said upon the other side. They agree that all these things may be done. What can they say? Well, that they are not done in time of peace. That you cannot do them in time of peace; you cannot defend yourself by the exercise of force on the high seas in time of peace. Where, I should like to know, is such doctrine as that laid down? I hope my learned friends will find some authority for those positions. I have never been able to find such authority. The assertion is that a nation cannot defend itself by an act of necessary force in time of peace — a thing that an individual may do in civil society a nation cannot do; and cannot do when there is no other means of protecting itself. Of course it must be instantly perceived that if this power of defending yourself and your property from injury against the citizens of other nations is something which a nation cannot do in time of peace. If that is true, the assertion that you have got any rights at all is mere empty sound. A right that cannot be defended amounts to nothing. I would like to have those who assert that a nation cannot defend itself and its property in time of peace by acts of necessary self-defence, tell me how they can defend them. I hope they will be able to tell me. If a nation cannot defend its admitted and conceded rights in that way I hope they will be able to point out some way in which those rights can be defended and protected.

But there is no truth, there is no substance in the assertion that the exercise of the right of self-defence by the employment of acts of necessary force is confined to times of war. There is no substance in that. It exists in time of peace just as well. Whenever the necessity arises, the right arises whether it be in time of war or time of peace. It may arise in peace just as much in war. In point of fact the principal occasions, and the most frequent occasions for the exercise of this right occur in times of peace, and therefore the instances in which they are performed and the rules which govern their exercise apply to belligeerent conditions far more than they do to peace conditions. It is only the absence of the occasion which has led to the want of discussion of these rights in times of peace and to the establishment of rules for regulating them; but nevertheless the occasion may arise and when it does arise then it must be put in force.

Now, let me call the attention of the Tribunal to occasions when it does arise in times of peace. In the first place let me allude to those municipal regulations which are devised by different states for the purpose of protecting its revenue. I before remarked that the protection of the revenue of a nation could not well be effective unless the conduct of vessels could be taken notice of at a greater distance than three miles from the land. If a vessel intending a breach of the revenue laws of a nation had the power to approach those shores to a distance of three miles from the land, and there waited a favorable opportunity to slip in, it might at all times evade the revenue laws; and consequently I suppose most of the nations, certainly Great Britain and the United States — Great Britain from a very early period and the United States almost from the period of her independance — established laws prohibiting vessels from transhipping goods or hovering at a distance — well, much larger than that of three miles — three or four leagues from the shore being the limit which I think, is employed. What is the penalty which they denounce for that purpose. The penalty is capture and confiscation. They may be captured and confiscated in case they do that. Does that penalty and the enforcement of that penalty involve an extention of jurisdiction out to that limit of three or four leagues? Certainly not. It is an act of self-defence. It is an executive act, designed to protect the revenue interests of the country. So also in the case of colonial trade, a similar device was formerly adopted for the purpose of preventing the approach of vessels in the neigborhood of colonies of another country for the purpose of engaging in illicit trade with such colonies. In order to enforce such prohibitions, it was necessary that regulations should be adopted prohibiting vessels from hovering off the coasts. Consequently, if a vessel appears off the coast and did what was called " hover, " that is not proceed upon her voyage but wait there, apparently waiting a favourable time to run in, she subjected herself to the penalty of those laws and may be confiscated and captured. I think no nation has ever resisted the enactment or enforcement of those laws.

The President. — I do not think you are quite right about that.

Mr Carter. — So far as I am aware. There may have been cases where they were enforced under exceedingly unreasonable conditions; but I do not myself remember them.

The President. — I believe cases of that sort have given rise to international communication between nations. It may be that they have led to agreements.

Mr Carter. — Of course I will not be at all certain that such has not been the case. My acquaintance with them, I confess, has been derived mainly from the treatment of them that we find in books of international law; and when they are treated by writers of international law, they are treated as reasonable exercises of the power of self-defence, not objected to by nations unless they were admitted to be enforced under very unreasonable circumstance. To illustrate them I must again read what I

referred to once before. This was the case where a vessel was seized in time of peace outside the three mile limit for a violation of a regulation such as I have alluded to. It is the case of Church *v.* Hubbart. I read from the opinion of Mr Chief Justice Marshall on page 181 of the U S. Argument.

That the law of nations prohibits the exercise of any act of authority over a vessel in the situation of the *Aurora*, and that this seizure is, on that account, a mere maritime trespass not within the exception, cannot be admitted.

What was insisted upon was, that this was not a lawful capture.

To reason from the extent of the protection a nation will afford to foreigners, to the extent of the means it may use for its own security, does not seem to be perfectly correct. It is opposed by principles which are universally acknowledged, The authority of a nation within its own territory is absolute and exclusive. The seizure of a vessel within the range of its cannon by a foreign force is an invasion of that territory, and is a hostile act which it is its duty to repel. But its power to secure itself from injury may certainly be exercised beyond the limits of its territory.

Upon this principle, the right of a belligerent to search a neutral vessel on the high seas for contraband of war is universally admitted, because the belligerent has a right to prevent the injury done to himself by the assistance intended for his enemy. So, too, a nation has a right to prohibit any commerce with its colonies. Any attempt to violate the laws made to protect this right is an injury to itself which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same at all times and in all situations. If they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to.

In different seas and on different coasts a wider or more contracted range in which to exercise the vigilance of the Government will be assented to. Thus in the Channel, where a very great part of the commerce to and from all the north of Europe passes through a very narrow sea, the seizure of vessels on suspicion of attempting an illicit trade must necessarily be restricted to very narrow limits; but on the coast of South America, seldom frequented by vessels but for the purpose of illicit trade, the vigilance of the Government may be extended somewhat further, and foreign nations submit to such regulations as are reasonable in themselves and are really necessary to secure that monopoly of colonial commerce, which is claimed by all nations holding distant possessions.

If this right be extended too far, the exercise of it will be resisted. It has occasioned long and frequent contests which have sometimes ended in open war.

That justifies the observations you have made, Mr President.

The English, it will be well recollected, complained of the right claimed by Spain to search their vessels on the high seas, which was carried so far that the Guarda Costas of that nation seized vessels not in the neighbowrhood of their coasts.

This practice was the subject of long and fruitless negotiations, and at length of open war. The right of the Spaniards was supposed to be exercised unreasonably and vexatiously, but it never was contended that it could only be exercised within the range of the cannon from their batteries.

Indeed, the right given to our own revenue cutters to visit vessels four leagues from our coasts is a declaration that in the opinion of the American Government no such principle as that contended for has a real existence. Nothing, then, is to be drawn from the laws or the usages of nations, which gives to this part of the contract before the court the very limited construction which the plaintiff insists on, or

which proves that the seizure of the *Aurora* by the Portuguese governor was an act of lawless violence.

That very extract — I think the whole of it; at all events the most substantial part of it — was quoted by Lord Chief Justice Cockburn of England in delivering his judgment in the very celebrated and rather recent case of the Queen vs. Keyn. It is found in the Exchequer Reports. I do not know but my learned friends may have it in their possession. I find that I have it here myself. The part to which I particularly refer will be found on page 149. Lord Chief Justice Cockburn says.

Hitherto legislation, so far as relates to foreigners in foreign ships in this part of the sea, has been confined to the maintenance of neutral rights and obligations, the prevention of breaches of the revenue and fishery laws, and, under particular circumstances, to cases of collision. In the two first, the legislation is altogether irrespective of the three mile distance, being founded on a totally different principle, viz, the right of the state to take all necessary measures for the protection of its territory and rights, and the prevention of any breach of its revenue laws. This principle was well explained by Marshall, C. J., in the case of Church *v.* Hubbart.

And he then cited the passage which I have just read from that decision.

The Tribunal thereupon adjourned until Tuesday, April 25 th, 1893.

NOTICE

On the 18th April 1893 a notice of which the following is a copy was sent by the United States Agent to the arbitrators :

In view of certain misleading statements in the London newspapers, the Agent of the United States desires to inform the Arbitrators of the reasons given by him to the British Agent for his action in withdrawing from the joint arrangement for a daily shorthand report of the proceedings of the Tribunal. Under date of the 10th instant he informed the British Agent, in view of the experience then had, that the main object of the arrangement, namely, to lay before the Arbitrators the argument of counsel early on the day following their delivery, had failed; that the counsel of the United States had found the reports of the arguments, as printed, so far from correct as to make them in great measure useless, and that the burden imposed on them of revision was an intolerable tax upon their time. The report of the first week's argument (April 4th to 7th) had not been revised and put into intelligible shape before the motion upon which they had been made had been definitely decided by the Tribunal; and they have not, in fact, up to this date been laid before the Tribunal.

As no change in the existing arrangements was proposed by the British Agent, the Agent and Counsel of the United States felt it their duty to withdraw. The question of expense did not enter into the consideration of the subject.

Having regard to the statement in the above notice that " no change in the existing arrangements was proposed by the British Agent " it is thought desirable that the whole correspondence should be placed before the arbitrators. The following is a copy of the correspondence which passed.

Paris, April, 10th 1893.

Dear Mr Tupper,

I regret to have to inform you that the experience of the past week, in the effort to produce a daily verbatim report of the proceedings of the Tribunal of Arbitration, has not proved satisfactory. The main object had in view, namely to lay before the Arbitration the arguments of Counsel early on the day following their delivery, has in great measure failed. The Counsel of the United States find the reports of their arguments as printed so far from correct as to make it in great measure useless, and the burden imposed upon them of revision is an intolerable tax upon their time; and this of itself is a sufficent reason to make it desirable that the present arrangement be abandoned.

Up to the present writing we have not received from your side the first reading of the unrevised proof of either the first or any other succeeding day. After it is received we shall have numerous corrections of our own to make before it goes to the printer. It is, therefore, plain that the revised proof will not be ready to lay before the Arbitrators until they have considered in secret session, and possibly decided, the motion upon which the arguments have been made.

I do not wish to impute neglect or inefficiency to any one. I merely state that the system, which we attempted with some misgivings, has proved entirely unsatisfactory and should be abandoned. I have, therefore, to propose that we at once give notice to the firm of short-hand reporters and the printers that the effort of

further joint reporting come to an end; that we perfect and print the proceedings of the past week; that we settle with the shorthand firm and printers on mutually satisfactory terms; and that any further reporting will be left to each Agent to be done in such manner as he shall see fit for the convenience of the respective Counsel.

Very truly,

JOHN W. FOSTER.

Paris, April 11th, 1893.

Dear Mr Foster,

I beg to acknowledge the receipt of your letter of the 10th. April.

I regret the determination you have reached respecting the daily reports of the Arbitration proceedings. I trust you will give this subject reconsideration.

I am glad to observe that you make no complaint regarding the actual shorthand-writing. Messrs Cherer Bennett and Co's reporting is, I believe, considered as perfect as it is possible to procure anywhere. Their transcripts, I am informed, are invariably used in all the English Law Courts. The correct printing of these transcripts is therefore alone concerned.

In my opinion, considering the difference of language and the very great pressure of time, the work already done, does Messrs Chamerot and C° credit.

These gentlemen cannot yet be said to have had a fair trial. From the marked improvement shown in each succeeding day I am led to hope that in a very few days the reports will be quite satisfactory.

Touching the burden of the correction of proof, up to the present time it has not been found necessary to ask the British Counsel to revise their speeches at all. The corrections, which are principally typographical and grammatical, have been readily made by one of our staff who heard the arguments. If this work becomes too heavy to be executed in the short time available, the object in view would be well worth the expense of employing a special reader.

The British Government attach great importance to an accurate verbatim record of the actual arguments used, and in view of their value to the Tribunal and their obvious utility, I trust you may yet see your way to continue the present arrangement.

Yours very truly,

CHARLES H. TUPPER.

Paris, April 12th, 1893.

Dear Mr Tupper,

Your letter of the 11th instant respecting the shorthand reports has been received and duly considered.

After again submitting the subject to the Counsel of the United States, and taking their views thereon, I regret to say that I am constrained to adhere to the proposal contained in my letter of the 10th instant.

Very truly,

JOHN W. FOSTER.

Hon. Chas. H. Tupper, etc., etc., etc.

FOURTEENTH DAY. APRIL, 25TH, 1893

Sir Richard Webster. — Mr President, of course, we are very much concerned at learning that the Tribunal cannot be properly constituted to-day. In all probability, the Tribunal will think that the best course to adopt would be in some way to fix such a day that Lord Hannen will have no anxiety as to the meeting and will be really restored to health; because it would be lamentable, after all the pains which the Tribunal has taken, if there was anything like a failure of procedure in consequence of illness. I think I may say that I speak with the concurrence of my learned friends and myself that we would fall in with any arrangement which would meet the views of the Tribunal, being only anxious, as soon as we can, as indeed, I-am sure, you are yourselves, to resume our labours.

Mr Phelps. — I need only say that we shall very cheerfully assent to any arrangement that the Tribunal propose; and I quite concur with my learned friend.

The President. — The Tribunal quite concurs with the feelings that you have expressed; and, on account of the sickness of one of our Arbitrators, Lord Hannen, who is unable to be present with us today, the Tribunal orders we should adjourn till Tuesday next, May the 2nd, at 11.30.

[The Tribunal accordingly adjourned.]

FIFTEENTH DAY. MAY 2ND, 1893

The President. — Mr Carter, we are ready to hear you.

Mr Carter. — Mr President, at the last sitting of the Tribunal at which argument was heard, a question was addressed to me by the learned President in the course of my argument, which I did not at the moment precisely understand, or I should have answered it at that time. I thought it had more particular reference to the construction to be placed upon Article VII of the treaty, and, therefore, said that I would postpone my answer to it until I came to treat of that Article.

While I was engaged in the discussion on the question of property in the seals, and near the close of my argument upon that question, I dwelt upon the consideration that the grounds and reasons of my argument in support of the proposition that the United States had a property interest, were grounds and reasons not selfish to the United States, but which interested the whole world; that the property was one in which the whole world had a beneficial interest. The question which was addressed to me was whether that property interest was of the kind mentioned in question 5 of the Treaty, or whether it was a qualified property interest of a different kind. I should be misunderstood if I gave the idea that the property interest of the United States which we assert in the seals were anything else than a full and complete interest. The grounds upon which we support that interest are indeed, among other things, the common interest of mankind in the seals, which can be worked out and made available to mankind only through the instrumentality of awarding a property interest to the United States. But that property interest when awarded is in no respect different from a property interest as held under any other circumstances. It is a full and absolute property, entitled to all the protection of property, and which confers upon the owner all the rights which property under any circumstances confers. It is, therefore, the sort of property interest mentioned in the 5th question submitted under the Treaty.

I now resume my argument at the point at which I left it, upon the question whether, assuming that the United States has a property in seals or a property interest in the industry which it maintains upon the Pribilof Islands, it has a right to protect that property, or that property interest, when necessary by the employment of reasonable force upon the high seas. I had supported my view by showing that it was the necessary consequence of the award of such a right that there was no other way in which a nation could protect its rights when invaded upon the high seas except by the employment of force. I had undertaken to show that that was the universal method nations pursued, and I had illustrated my view

by reference to many instances, most of them of the class of belligerent rights, where force was thus employed by a nation on the high seas to prevent any invasion of its rights.

The answer intimated to that view in a part of the argument of Great Britain is, that the instances in which a nation may employ force on the high seas to protect its rights, and to capture the vessels by means of the employment of force, are limited to cases of belligerency, and do not exist in peace. I proceeded to show that that was not the case, that, although the instances were more frequent in time of war when the employment of force was resorted to, still whenever necessity occurred, which was the sole foundation of the right, it was resorted to in peace just as much as in war. I alluded in support of that view to the decision of Mr Chief Justice Marshall in the supreme Court of the United States, in the case of *Church v. Hubbart*, which was a case where a nation had established a regulation for the purpose of preventing an invasion of its colonial trade. A vessel of another country contemplating an enterprise of an illicit character in violation of the exclusive right of this nation to colonial trade, was found outside the three mile limit, actually engaged, however, in an attempt to carry on this prohibited trade. She was seized, carried in o and condemned, and that condemnation was fully supported by the supreme Court of the United States; and not only was the condemnation itself supported, but the regulation which had been adopted in reference to it was also supported. That decision, I had also occasion to say, had been cited with approval, and extended citations from it read with approval by Lord Chief Justice Cockburn, of the Court of Queen's Bench in England, in giving his opinion in the case of the *Queen v Keyn*. With the citation of those commanding authorities I might well leave the subject. That decision, in the narrowest view of it, fully sustains any employment of force by a nation in time of peace upon the high seas, for the purpose of arresting and capturing a vessel which is actually engaged in an invasion of its rights. That proposition is fully supported by the decision itself, and the passing of regulations for the purpose of governing the exercise of that right is also supported in the opinion which is given.

It is, however, true, and a distinction is to be noticed here, that regulations designed to govern the exercise of this right of self defence sometimes go a step further than the mere making of provision for the seizure and capture of a vessel on the high seas. When she is actually engaged in an offence against the laws of the nation which undertakes the seizure, they sometimes go a step further than that, and make the conduct of a vessel when she justifies a suspicion by her conduct that she is intending an illicit or prohibited trade, or intends any other violation of the laws of the nation itself, an offence, although in point of fact it might be true that the vessel was not actually engaged in a violation of the laws of the nation adopting such a resolution. Now when these regulations go to that length, they do go beyond the mere right of employing force

and enter the field of legislation, and assume a limited and qualified right to make laws operative upon the high seas. That is the nature of regulations of that sort when they undertake to regard acts as offences which are not in their nature necessarily offences. If a vessel is actually engaged in an attempt to carry on a prohibited trade with a nation's colony, that act is necessarily of itself a violation of the rights of that nation, but, if she is not doing that, if she happens to be involved in circumstances which throw suspicion upon the nature of the enterprise in which she is engaged and justify a suspicion that she is really contemplating a prohibited trade, if there is a regulation which makes that conduct of itself a crime, that we must admit is a piece of legislation which assumes the right (a limited right it is true) of passing laws operative upon the high seas.

Now, all the doubt and all the controversy which has arisen in reference to this question of the exercise by a Nation of the right of self-defence upon the high seas turns upon the validity of regulations of that sort, when they go beyond the mere governing of the right of self-defence and prescribing how it shall be exercised, and undertake to make distinct offences. The power of a Nation to do that has been disputed, and may perhaps still be the subject of dispute, even where it proceds only to the qualified and limited extent which I have mentioned. It will be observed that this exercise, even of the right of legislation in the case which I have mentioned, does not involve an assumption of a general authority to legislate over the sea. It is based strictly upon the right of self-defence, and is calculated to provide means by which that right of self-defence may be more efficiently exercised ; but nevertheless, it does partake of the quality of legislation ; whether it is valid or not has been disputed.

Now, that precise question arose in the Supreme Court of the United States in the case called *Rose* v. *Himely*, in the 4th Cranch, page 241. The circumstances of that case were substantially these, though I do not know that the Arbitrators will find it necessary to look them out. The French Authorities had made an ordinance prohibiting vessels sailing within 2 leagues of the Island of Saint Domingo in certain places and under certain conditions. A vessel was captured that had violated that ordinance, but the capture was made outside the 2 leagues belt. The question was whether that capture could be sustained ; that is to say, whether a capture by a Nation of a vessel upon the high seas which had been engaged in violating a municipal regulation was lawful. Mr Chief Justice Marshall was of opinion that it was not lawful, but a majority of the Members of the Court did not agree with him upon that point ; and so the point passed without being decided. It subsequently arose for decision in the case of *Hudson* v. *Guestier*, in the 6th Cranch, page 281 ; and it was a question in respect to a violation of the same ordinance, and also whether the capture had been made outside of this 2 leagues limit. This case of Hudson v. Guestier is reported twice. It came before the Supreme Court on two several occasions ; and the facts upon the last occa-

sion, which is the one to which I refer, or the proof, were different as to the locality of the capture from what it was when it came before the Court in the first instance. But, in the last instance, the evidence shewed that the capture had taken place ontside of the 2 leagues limit. Upon the argument of the second case, it was held that the capture was lawful by a majority of the Court; and the expressions in the opinion of Mr Chief Justice Marshall, or his *dicta* to the contrary effect, were overruled; and, therefore, so far as the Supreme Court of the United States is concerned, it is held that Regulations of the character I have mentioned even when they go beyond supporting the strict case of capturing a vessel that is actually engaged in a violation of the rights of a nation, and even although she is on the high seas, — this case supports a decision to the effect that a regulation going further than that and constituting a prohibited area within which a vessel shall not come whether upon an act of a rightful or of a wrongful nature, is in accordance with law.

Now, let me say, however, that the United States upon this argument avoids all controversy of that sort. We do not ask for the application of any doctrine, even although we might, to the effect that we can establish any particular area on the high seas and exclude the vessels of other nations from it. We do not ask to have it determined that we have the right to say that the offence of pelagic sealing, when committed by other vessels, is a crime for which we can punish the citizens of that nation, because that would be legislating for the seas. We do not ask for a decision that we can make a law and enforce it by which we could condemn a vessel that had been engaged in pelagic sealing though the offence had been completed and the arrest and conviction was for a past and completed offence. We assert no right of that sort, although, under these decisions, we might do it. The doctrine maintained by the United States simply amounts to this; that, whenever a vessel is caught red-handed, *flagrante delicto*, in pelagic sealing, the Government of the United States has the right to seize her and capture her; that is to say, she has the right to employ reasonable, necessary force for the purpose of protecting in the only way in which she can protect her property in the seals, or her property in the industry which she maintains on the islands. That is the extent of her assertion.

Now if she cannot protect it in that way is it possible for her to protect it at all. My argument assumes that I have been successful in showing that the United States have a property interest in these seals wherever they are upon the high seas as well as upon the land, or if not that she has a property interest in the industry which she carries on at the Pribiloff Islands which she is entitled to protect.

The practice of pelagic sealing we have shown is destructive of either or both. A United States cruiser finds a vessel actually engaged in destroying those seals, the property of the United States if you please. She warns her off, commands her to desist from the trespass in which she in engaged.

Suppose the vessel refuses, what is to be done then? Is the cruiser to allow her to proceed in the execution of her trespass — stay by her, follow her into some port and there seek redress in the municipal tribunals of some power — are we driven to that! That, of course, would be wholly ineffective, and if it were effective in any degree or any instance, it would require the entire Navy of the United States to carry it fully out. You would have to have a ship of war for every pelagic sealer. That is, of course, absolutely ineffective. Nor does it comport with the dignity of a nation. No nation has ever yet deigned in the defence and protection of its rights upon the high seas to wait till it could resort to the municipal tribunal of some power and there seek to obtain such justice as it could.

One other resort might be suggested. You might say that the Government of the United States might make the conduct of these Canadian pelagic sealers under such circumstances the subject of complaint to Great Britain herself. What should she say to Great Britain? Ask her to prohibit this conduct? How could Great Britain prohibit it? Only by employing a part of her fleet to do it. Is it the business of a nation to furnish a force to protect the rights of another nation? Would not the prompt answer of Great Britain be under such circumstances, "This is not our act; we do not adopt this. We agree that you have a property in these seals. We do not command, aid, encourage or in any mode assist the action of these pelagic sealers. If they are trespassing on the rights of the United States, is the United States so feeble that it cannot defend its rights upon the high seas?" What answer could the United States make to such an enquiry as that? No, there is no other way by which a nation can protect its rights upon the high seas except by the employment of force — force employed as an individual would employ it — force not derived from any law whatever, but force derived from the fact that you have a right which somebody else is engaged in committing a trespass upon — a trespass which you cannot prevent in any other way except by the employement of force.

These rights frequently asserted in time of war, are not so frequently asserted in time of peace, but only because the necessity for it does not so frequently arise, but still they are asserted and must be asserted — asserted whenever a nation wants to protect with efficiency her colonial trade — asserted whenever a nation wants to protect with efficiency her revenue laws against smuggling by citizens of other nations — asserted whenever she wishes to enforce with efficiency in time of contagion her quarantine laws — whenever indeed an instance arises in which the rights or the property of a nation may be endangered or imperilled by the acts of other citizens upon the high seas, whether in peace or war, there is occasion for the employment of force. Now upon this point, without going into any further discussion, as I wish to be more precise I have drawn up a series of propositions which embrace the views entertained and asserted by the government of the United States upon these points.

First. The territory of a nation consists of the land within its dominion and what are commonly called its territorial waters, which embrace interior gulfs, or

bays nearly enclosed by its territory, but connected with the sea by headlands separated by short distances, and a narrow belt of the open sea along the shore, of the width, as commonly allowed of three miles, or a cannon shot.

Second. The exercise of the sovereign legislative power of the nation is limited to its territory as above described except in special instances where, for reasons of necessity, a nation may exercise a limited legislative power over neighbouring parts of the sea beyond the narrow belt above mentioned. Outside of the territory of the nation, its laws, as laws, have except as above mentioned, no operation or effect. The ships of a nation, however, are, even when on the high seas, deemed to be a part of its territory.

Third. Nor can a nation with the special exception above mentioned take any action outside of its territory for the purpose of enforcing its laws, or punishing a breach of them. Its writs, or other processes, or orders of its Courts, cannot be lawfully executed outside of its territory.

Fourth. Two sovereign nations cannot exist together upon the same land. The sovereignty of one must necessarily yield to that of the other. But all sovereign nations may co-exist upon the seas. They may go and be there as individual persons upon terms of absolute equality. In legal contemplation they are there whenever the interest which they are bound to defend, such as their property, their citizens or the property of their citizens are there.

Fifth. In the just defence of its existence, or its rights, a nation may employ, anywhere upon the high seas, against those who attack its existence or rights, such force as may be necessary and reasonable. This is a self evident proposition ; for, inasmuch as a nation cannot prevent invasion of its rights upon the high seas by legislation, and by judicial proceedings to enforce legislation, it would be absolutely without means for protecting them, unless it had the power of necessary self-defence. Any suggestion that it might institute civil suits against trespassers in the municipal courts of other nations would be to no purpose. Such proceedings would be wholly ineffective, and would, besides, not comport with the dignity of the nation

Sixth. The action of the officers and agents of a nation, in exercising this right of necessary self-defence, may, and should, be governed by rules and regulations, which may according to the internal constitution of a nation, and the distribution of its powers, assume the form of executive instructions, or municipal laws, or rules. Neither are necessary to the existence of the power. They serve to govern the exercise of the power which exists independently of them. In constitutional governments, where the sovereign power is distributed among different departments, such rules and regulations may be necessary. Other governments cannot insist upon them.

Seventh. In the exercise of this power of self defence the nation is responsible to other nations whose citizens may have suffered from its exercise. If a necessity is shown for its exercise, and the limitations of such necessity have been observed, the act is justified. If otherwise, a wrong has been committed and reparation must be made.

Eghth. The capture by a belligerent nation of the vessels of a neutral power when found carrying contraband of war or engaged in running a blockade are familiar instances of the exercise of this right of self-defence. The rules derived from the practice of nations governing the exercise of such right of capture, with such other reasonable rules as the belligerent nation may prescribe, are regulations designed to govern the conduct of the officers and agents of the belligerent and to prevent abuses of the right which would make the belligerent answerable to the neutral nation whose ships have been captured.

The prize courts which administer these rules although proceeding according the judicial methods, are not really courts administering justice between man and man, like instance Courts, but agencies for the purpose of informing the belligerent sovereign whether he ought to sustain a capture as regular and rightful or admit it to be a trespass and a wrong, for which reparation is to be made. (*Rose* v *Himeley*, opinion of Johnson J ; 4 Cranch 282.)

Ninth. The notion that this right of self-defence is a purely belligerent right

and cannot be exerted in time of peace is unfounded. It proceeds upon the manifestly erroneous assumption that the rights of a nation upon the seas cannot be attacked or endangered except in time of war. That the instances calling for the exercise of the right in time of war are more frequent, and that they are, comparatively rare in time of peace is true, but that they may, and do, arise in time of peace is equally true.

Tenth. If it were true that a nation could not exercise in time of peace any act of force to protect its rights, it would follow that a nation could not interfere with a vessel under a different flag which was hovering on her coast, outside of the three mile limit with an openly avowed intention of evading the revenue laws of the nation; or interfere with a vessel hovering in like manner and at a like distance from the coast of a nation's colony with an openly avowed intention of engaging in illicit trade with such colony; or interfere with a foreign vessel hovering outside of the three mile limit on the coast of a penal colony with an avowed intention of running in at a favourable moment and rescuing convicts; nor, if this were true, could a nation prevent a foreign ship with an infections disease on board from coming within a distance of four miles from a port even though it was reasonably certain that the disease would thereby, and at that distance be communicated to its people.

Such a conclusion would be repugnant to reason, as well as to the actual practice of nations.

Eleventh. The municipal laws or rules adopted by nations to govern the exercise of the right of self-defence are not always rigidly limited to a regulation of that right; but sometimes go further and seek to exercise a limited *legislatave power* beyond the territorial limits of the nation. So far as they have the latter purpose in view they are exceptional, and can be defended only upon grounds of special necessity.

Rules and regulations providing for the seizure and condemnation of a vessel actually engaged in running a blockade would be a mere regulation of the strict right of self-defence and be open to no objection; but if they went further and provided for the trial and punishment of the officers and crew, or for the seizure and condemnation of vessels for *past* breaches of a blockade, they would transcend the necessities of self defence and assume the character of *legislation*. The arrest, trial, and conviction of persons for acts done by them on the high seas, assume the right of legislating for the high seas; and the same thing may be said of a law which subjects a vessel to seizure and condemnation, not for a *present* invasion of the rights of a nation, but for one which has been completed and is past.

And so also it might be contended that a municipal law designed to prevent smuggling, or illicit trade, by prohibiting vessels from hovering within certain prescribed distances from the coast, transcended the requirements of necessary self-defence and partook of the character of legislation. The actual practice of nations has been not to draw a rigid line between the two descriptions of power, but to sanction reasonable restrictions and prohibitions imposed by a nation, although partaking of the character of legislation, when they were fairly designed to secure the purposes only of a just self-defence. (Church V. Hubbart, 2 Cranch, 287.

Twelfth. But it is not necessary for the Government of the United States to insist, nor does it insist, upon a right to punish individual citizens of other nations who have been engaged in pelagic sealing as having been guilty of a crime, nor upon a right to seize and condemn vessels for having *in the past* been guilty of pelagic sealing, nor upon a right to establish any area of exclusion around any part of its territory. It insists, only that if it be determined that it has a property in the Alaskan seal herd, or a property interest in the industry which it maintains upon the Pribilof Islands, that it follows, as a necessary consequence, that it has the right to prevent the invasion and destruction of those property interests, or either of them, by pelagic sealing, by the employment of such force as is reasonably necessary to that end.

Thirteenth. The Government of the United States conceives that, if its contention that it has the property interest above-mentioned, one or both, be established,

and a vessel fitted out for the purpose of pelagic sealing under whatever flag, should approach the neighbourhood of the Pribilof Islands and engage in the taking of seals at sea, it would have the right to prevent such taking of seals in the only manner in which it would be possible to prevent it, namely by the capture of the vessel; and that it can make no difference whether such vessel be three, or four, or more, miles from such islands; and that if such capture can be made anywhere within four miles of said islands, it may lawfully be made at any distance from the islands where such right may be invaded in the same manner.

Fourteenth. The United States insists that it would have the right last above mentioned without passing any municipal law, or adopting any municipal regulation, to secure it, or to govern its exercise; but it, at the same time, supposes that the passage of a law regulating the exercise of such right and providing for a mode of condemnation of vessels seized would be entirely proper, and one of its reasonable duties. That it would serve the same just purposes as are answered by prize laws, namely, to give the citizens of other nations notice and warning of its intentions, regulate the conduct of seizing officers, prevent injustice and oppression, and inform the government, and other governments, respecting the regularity of any seizure, to the end that, if rightful, it should be adopted by the United States, and acquiesced in by other governments which might be interested; and, if otherwise, be repudiated and made the subject for just reparation.

Fifteenth. In respect to the seizures actually made and decrees of condemnation thereon, the United States perceives no particular in which they are irregular, unjust or not defensible as an exercise of the right of necessary self-defence. It does not defend any sentence of fine and imprisonment imposed upon any citizens of other nations for engaging in pelagic sealing; but insists that any such invalidity with which such sentences may be affected, has no tendency to impair the validity of a condemnation otherwise valid.

Sixteenth. The familiar law of piracy illustrates and confirms the foregoing conclusions. The general consent of nations has sanctioned the practice of the arrest, trial and sentence of pirates, even when they have not invaded any right of the nation so dealing with them, or its citizens, either of person or property. Pirates are everywhere justiciable.

This is an exceptional instance in which nations are permitted to defend the general order, security, and peace of the seas. But it cannot be doubted that, irrespective of such general consent, and had it never been given, any nation would have had the right to defend one of its own ships from capture by pirates, and, in the course of such defence, and as a part of it, to capture the piratical vessel and condemn it by proceedings in its own courts.

Seventeenth. The Government of the United States therefore, bases its claim to defend its property interest in the seal herd and in its industry maintained upon the Pribilof Islands by such force exerted upon the high seas as may be reasonably necessary to that end upon the following grounds:

1. The reason and necessity of the thing, there being no other means adequate to the defence of such rights.

2. The practice and usage of nations which always employs this means of defence.

Those, then are the grounds upon which the United States asserts its right to the employment of reasonable force. If it has a property in the seals that property is invaded whenever they are attacked by pelagic sealers; and that property in the seals themselves, and the necessary defence of it, gives the United States the right to prevent that practice by the arrest and seizure of the vessel. If it should not be decided that it has a property interest in the seals themselves, but has a property interest in the industry which it maintains in the Pribilof Islands, — a rightful, lawful and useful industry — then its right to arrest the practice of pelagic sealing in

the sea does not depend on the property interest in the seals, but upon the fact that that practice is destructive of a right which it carries on upon the land.

In order, therefore, to justify that act of pelagic sealing, it is necessary to show that it is, in itself, a right, and if that were shown, then the United States would have no right to interfere with it; but if it is in itself a wrong — if upon the fundamental and immutable distinctions between right and wrong everywhere prevalent upon the sea as well as upon the land that act, destroying a useful race of animals, is not defensible as a right — then interfering as it does with the lawful rights and industry of the United States, they have the right to prevent it by the practice of this same means.

We have two grounds, therefore, upon which we assert the existence of this right to the employment of force. The first is, the reason and necessity of the thing; because the declaration that we have a right, involves the concession that there is some means of defending it. To say that a nation has a right, which, at the same time, the citizens of every other nation of the world can trample upon and violate with impunity is to commit a solecism. Such a thing would have none of the characteristics of a right. We defend it in the next place, upon the practice and usage of nations. Wherever a nation is shown to have a right upon the high seas that is endangered by the wrongful acts of the citizens of other nations, there, according to the usage and practice of nations at all times in peace or war, that right has been defended by the employment of reasonable force.

Now, Mr President, I have concluded my argument on the question of the right to employ force upon the high seas. I must now contemplate the possibility that this Tribunal may decide either that the United States have no property in the seals — no property interest in the industry carried on the islands, which they have a right to protect, — or that if they have those rights, or either of them, they still have no power to protect them by the seizure and condemnation of a vessel engaged in the practice of pelagic sealing. In either one of those cases the United States would have no power whatever to protect these seals from extermination, and, consequently, in either one of those cases the subject is left (to borrow language of the Treaty) in such a condition as to require this Tribunal to proceed to the consideration of the last matter which is submitted to it, namely, what regulations it is necessary to establish for the purpose of preserving the seals.

Sir Charles Russell. — Might I beg my friend's pardon for a moment? Mr President, I wish to restate the position which, at an early part of these proceedings, we took upon the question of the order of procedure. We maintained, and still maintain, that the question of right raised in various forms — the first five questions of Article VI is distinct from, and ought to be dealt with in argument as distinct from, the question raised in Article VII, which is the subject of regulations. I understand from

my friend that it would be a convenient thing for him to be allowed to continue his address to the Tribunal, and to explain in that address his views upon the question of regulations, and I do not, therefore, ask any opinion from the Tribunal as to whether that course ought or ought not to be permitted. I interpose no obstacle, but I wish to intimate to the Tribunal that we do not recede from the position that we have taken up; and that we shall respectfully claim the right to present complete, by my friends and myself, our argument upon the question of right, and not to mix up with the question of right, the entirely separate and distinct question (embracing as it does different considerations), which touches the matter of regulations pure and simple. With that respectful representation of our views to the Tribunal, I do not further interpose.

The President. — Thank you, Sir Charles, for the view which you take of the manner of proceeding. It is true the Tribunal have agreed that they would allow the counsel of either party to proceed in their argument according to their own convenience, but we have merely asked the counsel in the proceeding here, as much as it might be possible, to treat separately in two distinct parts of their argument, the legal questions such as are enumerated in Article VI of the Treaty, and the question of regulations such as are alluded to in Article VII. This, as I notice, Mr Carter is prepared to do, and has been dealing until now, with the legal question. I think you [Mr Carter], are coming now to the points which are referred to in Article VII; consequently that is according to what we wish you to do, and we are much obliged to you that you do it. As to the point raised, the counsel for Great Britain asks no expression of opinion on the part of the Tribunal; consequently the counsel for Great Britain will be free also to treat the matter according to their own convenience, either separately in two distinct arguments, or else in the same way as Mr Carter has dealt with it. I conceive that, with the agreement of everybody, Mr Carter is free to continue his argument as he wishes to do.

Mr Justice Harlan. — I want to say, if the President means to say that the Tribunal recognizes the right of counsel to make two arguments first on the five questions named in Article VI, and after that, at some future time, to claim a right to enter a distinct argument as to regulations, I do not concur in that view, and I do not understand that the Tribunal has so decided.

Sir Charles Russell. — I should certainly claim it.

Lord Hannen. — We had better retire for a moment to discuss it.

Mr Justice Harlan. — I do not think we need retire to consider that, and I make these observations so that it will not hereafter be said that the right is reserved to cut this argument in two.

Sir Charles Russell. — I shall certainly claim it.

Mr Justice Harlan. — That the right is reserved to have this Tribunal make an intimation as to our conclusions upon the first five points, and thereby inform the public of our conclusions before we take up the

subject of regulations — I do not wish it understand that I concur in that view.

Lord Hannen. — No, but that is a different question.

The President. — We are all of the same opinion on that.

Lord Hannen. — There is not entire agreement, it is plain, I regret to say, amongst us, as to what we had agreed upon, and we had better discuss that during our adjournment.

Mr Justice Harlan. — I do not understand there is any difference between us as to what we have decided. We had agreed that counsel should proceed in their argument as they should deem it proper, covering those questions, but I understood the President, a moment or two ago, to say that the Tribunal have decided, or were to be understood as having decided, that the counsel for the Bristish Government could proceed with their argument upon the main questions, according to their own pleasure, and at some future time make an argument upon the subject of regulations. I so understand counsel to say he would claim it. I only intervene because, if that was the understanding of the President's action of the Tribunal, I only would to say I have not understood that the Tribunal have decided any such thing, or that we have considered it.

The President. — I believe counsel for Great Britain do not ask us to deliver any sort of opinion after they have treated the legal points; I merely understood that they asked to be allowed that several of them might speak and argue upon the legal points, and after that resume the argument about the regulations. That is a mere method of division, of work between themselves — one of them begins speaking about the legal points, another of them continues about the legal points, and then afterwards they resume.

Sir Charles Russell. — If I might with propriety interpose there is no reason why I should not explicitly state what we mean. It is this : that my friends and myself propose to submit a complete argument dealing with one subject and one subject only, distinct and separate in its character, and to which legal considerations alone apply; having presented that argument unmixed and unconfused with another and a different subject, we shall then, at whatever moment is convenient to the Tribunal, proceed — it may be immediately after, to discuss the question of regulations; but that we shall present the two arguments separately.

Lord Hannen. — Yes. You will not call upon us to give a decision on the five points before you discuss the question of regulations ?

Sir Charles Russell. — No my Lord I have not suggested that at all.

Lord Hannen. — That is the only question upon which it is supposed there is a difference between us, which I think will disappear.

Sir Charles Russell. — I mentioned this to my friend Mr Phelps as a course which might obviate the necessity of the Tribunal being called upon to make any decision upon a minor point as to which there might or

might not be existing differences of opinion amongst the members of the Tribunal. I think my friend Mr Phelps will say that he recognized my suggestion as a reasonable one.

Mr Phelps. — The course suggested by Sir Charles Russell will be quite acceptable to us, and it has been the subject of previous conversation.

The President. — So I understand.

Mr Phelps. — The only point of difference at the outset was that which has been suggested, whether the Tribunal was to be called upon to express a decision or an opinion upon previous points before hearing the argument in respect of regulations; but as counsel on both sides understand it now, that claim will not be made, and we do not object at all to the method of argument proposed by my friend on the other side.

Mr Justice Harlan. — Of course what I said shows that. I made no criticism upon that argument at all. — I only understood the observation of the President to go beyond; that is why I made the remark that I did.

The President. — I merely say that the counsel for Great Britain will be free to argue their case as they like, and divide their work between themselves as they like, and I understand too that the Tribunal is agreed in leaving all liberty to the counsel of either party to argue their case as they like — not to take a decision until the whole argument of the case before us has been gone through by both parties. Are we agreed as to that?

Lord Hannen. — Quite so.

Mr Justice Harlan. — Yes, I am agreed as to that.

The President. — Perhaps, Mr Carter, you will proceed.

Mr Carter. — Mr President, the subject which has now to engage my attention, is that which in a certain contingency contemplated by the Treaty, has reference to the framing of regulations to be concurred in by Great Britain for the preservation of the seals. I think I have already observed at some time in the course of my argument, that however the two nations may have apparently differed upon what may be called the questions of right here, and however wide their differences may have been upon those questions, there is still one upon which they were apparently agreed at the outset; upon which they have been at all times agreed, and upon which I hope they will continue to be agreed until the argument of this controversy is disposed of, and that is, the necessity, upon all grounds, and in the interest of all nations, that this useful race of animals should not be exterminated and should be preserved and its benefits and blessings be made available perpetually for the use of mankind. It will be seen that the Treaty itself possesses two principal aspects; one of which calls upon this Tribunal to determine certain questions, affecting assertions of right on the part of the United States, which questions, were they decided in favour of the United States, would or might presumably, confer upon that nation the right to exercise this power of protection and render any further consideration of the question of protection needless.

The next feature of the Treaty is, that if those questions should be determined adversely to the United States, so that it would not have power itself to take measures for the preservation of the seals, that then the Tribunal should consider what measures the two nations must take conjointly with each other to that end.

Now there is or may be a question as to the interpretation of Article VII of the Treaty which I will now read :

> If the determination of the foregoing qustions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of Regulations for the proper protection and preservation of the fur-seal in, or habitually resorting to, the Behring Sea, the Arbitrators shall then determine what concurrent Regulations outside the jurisdictional limits of the respective Governments are necessary, and over what waters such Regulations should extend, and to aid them in that determination, the Report of a Joint Commission, to be appointed by the respective Governments, shall be laid before them with such other evidence as either Government may submit.
>
> The High Contracting Parties furthermore agree to co-operate in securing the adhesion of other Powers to such Regulations.

The language which is used in the beginning of this Article is :

> If the determination of the foregoing questions as to the exclusive jurisdiction of the United States.

Well, there are five foregoing questions and all the five seem to be embraced by that language, and yet when we look to the last of those five questions we find it to be :

> Has the United States any right, and, if so what right, of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea when such seals are found outside the ordinary three-mile limit.

That does not appear to be on its face a question relating to the exclusive jurisdiction of the United States, and therefore it would not upon its face appear to be properly described or properly embraced in the language with which Article VII begins.

Now, my own impression is that that fifth question is regarded by the Treaty and by this 7th Article of the Treaty as a question relating to the exclusive jurisdiction of the United States, using that word " jurisdiction " in the sense in which it is so often used, as a mere question of power. In other words, the Treaty regards the question whether the United States has any exclusive property interest in the seal herds and a right to protect them, an exclusive right to protect them upon the high seas, as a question of jurisdiction upon the high seas, and a question of exclusive jurisdiction implying the view that if the United States has the exclusive property in them or the property in this industry which justifies them in exercising a right of protection, that it has the exclusive right of protection upon the high seas; and that that is properly enough styled a question of jurisdiction. I myself incline to that interpretation; but, as I have already said in the former part of my argument, it is not necessary to go into any nice interpretation of the language in that particular; for,

whatever interpretation we adopt, the same result is practically reached. I say, it is of no practical consequence which view is adopted; the same result will follow whatever answer is given to this question of interpretation; for all the five questions are to be determined before the Tribunal is to be called upon to consider the question of regulations, and the disposition to be made of that question depends on the condition in which the subject is left after the decision of the five questions. For instance, if we proceed upon the view that the language referred to relates to the first four questions only and those are decided against the United States, it will be necessary for the Tribunal to consider what regulations are necessary. But should the decision of the fifth question be, at the same time, in favour of the United States, the conclusion upon such consideration might be that no regulations were in fact necessary. Such would be perhaps the conclusion if the Tribunal should be of the opinion that the possession of a property interest would give the United States the power to protect it by the employment of force upon the high seas; but if the Tribunal should hold contrary to my argument, that the possession of that interest would not give the right to employ force to prevent pelagic sealing, then concurrent regulations would become necessary. On the other hand, if the language referred to be taken to include all of the five questions, the five questions being regarded as one in relation to jurisdiction in the sense in which that word is employed, the subject will be left in such a condition that the concurrence of Great Britain will be necessary, provided the Tribunal were of opinion that the United States had no property interest, or that such property interest gave no right to employ force in its protection. Therefore, I shall not engage in any farther discussion of this question of interpretation. It is, practically, of no consequence.

Now then, what shall be the regulations for the preservation of the seals? The subject is now assumed to be left in such a condition that it is necessary that regulations of this character should be contrived. What should they be? What are their requirements? There are two qualifications made of them in the treaty, and two only. In the first place, they must be regulations operative only ontside of the jurisdictional limits of the two Governments. In other words, the field of their operations is to be on the high seas alone — that is one condition. The only other description that we have of them is that they shall be such as are necessary for the preservation of the seals; fitness for the accomplishment of that and that is the only requirement — the sole requirement, and it is an absolute requirement — of these regulations.

But there I am met by some intimation in the Case and in the Argument on the part of Great Britain that a somewhat different interpretation may be set up; and that some limitation will be sought to be imposed on the regulations which may be recommended by this Tribunal; and, in the first place, that they must be regulations conditional upon the consent of other Powers than Great Britain and tha United States, — not

operative at all until the consent of other powers shall be obtained. I am not absolutely certain but I gather, from what is contained in the Case and Arguments on the part of Great Britain, that that ground may be taken. Well, that cannot be maintamed. In the first place, that is not expressed in the Treaty. No such limitation is expressed there; and the omission to express it is in itself significant; because the subject of the consent of other powers is mentioned, and there is an intimation at the close of the Article as follows: — " The High Contracting Parties furthermore agree to co-operate in securing the adhesion of other powers to such regulations". That language of itself excludes any implication that the operation of the regulations is to be conditional upon the assent of other powers. It assumes that they are to be in operation, that it will be a matter of utlity or of convenience that the assent of other powers shall be gained to them; and the parties respectively engage to take all measures within their power to gain that assent. I say, therefore, that not only is it not expressed in the treaty that the regulations shall be thus conditional, but that we cannot imply it; and that the contrary is, indeed, suggested, if not absolutely required by the terms of the Article itself.

Senator Morgan. — Mr Carter, if the award of this Tribunal is to be merely tentative and not binding upon the parties that have submitted this case to the decision of these Arbitrators, why are we sitting here? We are not diplomatists; we are not advising counsel, or the particular friends of cither Government.

Mr Carter. — Well, that is one view, and a very proper and important one having the same tendency as the one I am now submitting to the Tribunal.

Senator Morgan. — Well, I do not hesitate to say, on my part, that if this award is to be accepted by the respective Governments or rejected at their pleasure, and is not to be an award in full force from the time of its being recorded and delivered here, that I would withdraw from this Tribunal.

Mr Carter. — I do not understand that there is any suggestion from any quarter that the award of this Tribunal is to be accepted or rejected; but it may be argued that this Tribunal may of itself make the regulations which it suggests conditional for their operation upon the consent of other powers. It is that supposed position I spoke to. I am sure the ground is not taken that the award of this Tribunal may be accepted or rejected at the pleasure of the parties. The contrary, I have reason to know, is conceded on both sides and maintained on both sides.

The President. — When you speak of " other powers, " you mean, of course, other powers than Great Britain and the United States?

Mr Carter. — Yes.

Now, there is further evidence that the treaty is subject to no such interpretation as that, derivable from the correspondence which preceded it. After the Treaty had been reduced substantially to the form in which it now stands, but before it was signed by the Parties although its phra-

seology was understood to be complete, a suggestion came from Lord Salisbury that the award of the Tribunal upon the subject of regulations should be made conditional upon the consent of other powers. That suggestion was made, and evidence of it will be found at page 339 of volume 1 of the Appendix of the United States in the Note from Sir Julian Pauncefote to Mr Blaine. It says :

Washington, November 23rd 1891.

Sir. I informed the Marquis of Salisbury of our proposal to sign the text of the seven articles to be inserted in the Behring Sea Arbitration agreement and of the joint commission article as settled in the diplomatic correspondence in order to record the progress made up to the present time in the negotiation. Lord Salisbury entirely approves of that proposal, but he has instructed me, before signing, to address a note to you for the purpose of obviating any doubts which might hereafter arise as to the meaning and effect of article VI, which is as follows.

The Arbitrators will remember that the present article VII stood originally as article VI.

« If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of regulations for the proper protection and the preservation of the fur-seal in or habitually resorting to the Behring Sea ».

And so forth.

Lord Salisbury desires to make the following two reservations on the above article.

His Lordship understands first, that the necessity of any regulations is left to the arbitrators, as well as the nature of those regulations if the necessity is in their judgment, proved. Secondly, that the regulations will not become obligatory on Great Britain and the United States until they have been accepted by the other Maritime Powers. Otherwise, as his Lordship observes, the two Governments would be simply handing over to others the right of exterminating the seals.

I have no doubt that you will have no difficulty in concurring in the above reservations; and, subject thereto I shall be prepared to sign the articles as proposed.

Now, that note, or a copy of it, is given to Mr Blaine; and his answer will be found on the following page, page 340 :

Washington, November 27th, 1891.

Sir : In the early part of last week you furnished the exact points which had been agreed upon for arbitration in the matter of the Behring Sea negotiation. You called later and corrected the language which introduced the agreement. In fact, the two copies framed were taken entirely from your minutes. It was done with a view that you and I should sign them, and thus authenticate the points for the arbitrators to consider.

You inform me now that Lord Salisbury asks to make two reservations in the sixth article. His first reservation is that the necessity of any regulation is left to the arbitrators, as well as the nature of those regulations if the necessity is in their judgment proved.

« What reason has Lord Salisbury for altering the text of the article to which he had agreed? It is to be presumed that if regulations are needed, they will be made. If they are not needed, the arbitrators will not make them. The agreement leaves the arbitrators free upon that point. The first reservation, therefore, has no special meaning.

The second reservation which Lord Salisbury makes is that the regulations shall not become obligatory on Great Britain and the United States until they have been accepted by the other maritime powers. Does Lord Salisbury mean that the United States and Great Britain shall refrain from taking seals until every maritime power joins in the regulations? Or does he mean that sealing shall be resumed the 1st of May next and that we shall proceed as before the arbitration until the regulations have been accepted by the other maritime powers?

Maritime powers may mean one thing or another. Lord Salisbury did not say the *principal* maritime powers: France, Spain, Portugal, Italy, Austria, Turkey, Russia, Germany, Sweden, Holland, Belgium, are all maritime powers in the sense that they maintain a navy great or small. In like manner Brazil, the Argentine Confederation, Chile, Peru, Mexico, and Japan are maritime powers. It would require a long time, three years at least to get the assent of all these powers. Mr Bayard, on the 19th of August, 1887, addressed Great Britain, Germany, France, Russia, Sweden and Norway, and Japan with a view to securing some regulations in regard to the seals in Behring Sea. France, Japan and Russia replied with languid indifference. Great Britain never replied in writing. Germany did not reply at all. Sweden and Norway said the matter was of no interest to them. Thus it will be again. Such a proposition will postpone the matter indefinitely.

The President regards Lord Salisbury's second reservation, therefore, as a material change in the terms of the Arbitration agreed upon by this Government; and he instructs me to say that he does not feel willing to take it into consideration. He adheres to every point of agreement which has been made between the two powers according to the text which you furnished. He will regret if Lord Salisbury shall insist on a substantially new agreement. He sees no objection to submitting the agreement to the principal maritime powers for their assent; but he cannot agree that Great Britain and the United States shall make their adjustment dependent on the action of third parties who have no direct interest in the Seal Fisheries, or that the settlement shall be postponed until those third parties see fit to act.

Lord Salisbury was not quite satisfied with that answer and another letter or letters were written in reference to it, and responses, more or less to the same effect on the part of Mr Blaine — to the effect that the President could not assent to any such alteration of the Treaty, or the insertion of any such provisions into it, and, in view of that unwillingness on the part of the United States, Lord Salisbury withdrew his request, and adopted the text of the Treaty as it stood, and, I think, I may say, the views of Mr Blaine in reference to it. The acceptance of the Treaty as it stood will be found on page 345, in a note of Sir Julian to Mr Blaine:

> Sir: I have the honor to inform you that I conveyed to the Marquis of Salisbury by telegram the substance of your note of the 14th instant respecting the sixth article of the proposed Behring Sea Arbitration agreement, and that I have received a reply from his lordship in the following sense:
>
> Lord Salisbury is afraid that, owing to the difficulties incident to telegraphic communications, he has been imperfectly understood by the President. He consented, at the President's request, to defer for the present all further discussion as to what course the two Governments should follow in the event of the regulations prescribed by the Arbitrators being evaded by a change of flag. It was necessary that in doing so he should guard himself against the supposition that by such consent he had narrowed the rights of the contending parties or of the Arbitrators under the agreement.
>
> But in the communication which was embodied in my note of the 11th instant, his lordship made no reservation, as the President seems to think, nor was any such word used. A reservation would not be valid unless assented to by the other

side, and no such assent was asked for. Lord Salisbury entirely agrees with the President in his objection to any point being submitted to the Arbitrators which is not embraced in the agreement; and, in conclusion, his lordship authorizes me to sign the article of the Arbitration agreement, as proposed at the close of your note under reply, whenever you may be willing to do so.

Of course, that puts that question at rest.

Sir Charles Russell. — Mr Carter, the view of the Government on the point we intend to submit is in the letter of the 11th December, 1891, at page 344.

Mr Carter. — Would you like that read?

Sir Charles Russell. — Yes; it is only the second paragraph.

Mr Carter. — Well, the whole letter is but short, and I will read it. It is from Sir Julian to Mr Blaine of the 11th December, 1891.

Sir, I have the honor to inform you that I telegraphed to the Marquis of Salisbury the substance of your note of yesterday respecting the sixth article of the proposed Behring Sea Arbitration agreement, and that I have received a reply from his Lordship to the following effect : In view of the strong opinion of the President, reiterated in your note of yesterday, that the danger apprehended by Lord Salisbury, and explained in my note of the 8th instant, is too remote to justify the delay which might be incurred by guarding against it now, his Lordship will yield to the President's appeal, and not press for furfher discussion at this stage. Her Majesty's Government, of course, retain the right of raising the point when the question of framing the regulations comes before the Arbitrators, and it is understood that the lattter will have full discretion in the matter, and may attach such conditions to the regulations as they may *a priori* judge to be necessary and just to the two powers, in view of the difficulty pointed out.

Yes, it was quite important to read this, I agree.

With the above observations Lord Salisbury has authorized me to sign the text of the seven articles, and of the joint commission article referred to in my note of the 23nd ultimo, and it will give me much pleasure to wait upon you at the State Department, for that purpose, at any time you may appoint.

Mr Justice Harlan. — Would you kindly read the letter just below that, which is the reply to the letter of the 11th.

Mr Carter. — Certainly. This is the reply of Mr Blaine :

Sir, I have the honor to advise you that I subitted your note of the 11th instant to the President. After mature deliberation he has instructed me to say that he objects to Lord Salisbury's making any reservation at all and that he cannot yield to him the right to appeal to the Arbitrators to decide any point not embraced in the articles of Arbitration. The President does not admit that Lord Salisbury can reserve the right in any way to affect the decision of the Arbitrators. We understand that the Arbitration is to proceed on the seven points which are contained in the Articles which you and I certify were the very points agreed upon by the two Governments. For Lord Salisbury to claim the right to submit this new point to the Arbitrators is to entirely change the Arbitration. The President might, in like manner, submit several questions to the Arbitrations, and thus enlarge the subject to such an extent that it would not be the same Arbitrators to which we have agreed. The President claims the right to have the seven points arbitrated, and respectfully insists that Lord Salisbury shall not change their meaning in any particular. The matter to be arbitrated must be distinctly understood before the Arbitrators are chosen. And after an Arbitration is agreed to neither of the parties can enlarge or contract its scope. I am prepared now, as I have been heretofore, to

sign the articles of agreement, without any reservation whatever, and for that purpose I shall be glad to have you call at the State Department on Wednesday, the 16th instant, at 11 o'clock, A. M. "

The President. — How would you construe the seven points which are hinted at or referred to in this letter.

Mr Carter. — " The President claims the right to have seven points "?

The President. — Yes. I suppose these are the five legal points; the Regulations, the joint Commission Article — I suppose it means that.

Mr Carter. — Yes I suppose it is.

The President. — But you have no particular construction of that? There were six articles in the original Treaty.

Mr Phelps. — The seventh is the question of damages.

Mr Carter. — Now that seems to put this matter at rest. It was evidently regarded by both sides that this seventh Article of the Treaty upon its face, upon a just interpretation of the language embraced by it, did no contemplate that the regulations should be conditional upon the acquiescence of other powers. It was upon that assumption that Lord Salisbury wishes to have an understanding tacked on to it to the effect that it should be so conditioned. That is refused. He then wishes to reserve a right to argue before the Arbitrators that the regulations should not be so intended and even that is objected to and the Treaty is eventually signed upon the assumption agreed to by both sides that it must be executed according to its language without any addition of facts without any reservation of any right other than what appears upon the face of it.

Now if it was a question whether it was proper or not that would have instantly to be decided against, — the suggestion of such a condition as the consent of other powers to be obtained before the regulations where made operative. That would be fatal. Every one knows that possibly some power might be induced to withhold its consent. That is one of the most reasonable suppositions in the world and even if one power should finally withhold its assent, how long would it take before the assent of all was obtained? We know the delays incidental to diplomatic communication, and there would be no good reason to suppose that this universal assent could be obtained in less that three or five years, and by that time the seals would be gone!

Therefore, any regulations on the subject of preserving the seals which will have any efficiency to that end must be Regulations immediatily operative as far as the two are concerned and practically no difficulty can arise upon that head. If pelagic sealing is prohibited by Great Britain and the United States no vessel under either of their flags will make its appearance upon the seas, and I venture to say that no other nation in the world after an expression of that character by a Tribunal such as this would allow its flag to be used for any such purpose. The public sentiments of mankind authoritatively declared by a Tribunal of this character

selected from the various nations of the world would be manifested in such a way that the nations of the world everywhere would respect it. There is no good reason to suppose there would be any attempt to violate it in any quarter, and, if there were any attempt to violate it in any quarter, it would be one which could be on good grounds resisted, and the violation would not be frequently repeated, so that I conclude that there is no such limitation to be put upon the Regulations which may be recommended by the Arbitrators.

There is another point in which it is intimated in the Argument on the part of Great Britain that these Regulations should be limited, that is to say, that the Treaty should be so interpreted as to mean that whatever regulations may be recommended by the Tribunal shall be applicable to Behring Sea, and not to the North Pacific Ocean.

I do not know whether that will be persisted in. It may be. The ground suggested is that the whole topic of the controversy, the whole subject of controversy, was the authority which the United States claimed to exercise in Behring Sea, that it did not claim that it had the right to exercise jurisdiction anywhere else, and that the whole subject of controversy being thus confined to Behring Sea, the scope of the regulations should be in like manner limited and should not pass that point.

Now I have to say, in the first place, that that construction cannot be accepted. There is no such view as that to be gathered upon the face of the Treaty itself, and upon the face of the Treaty itself that view is rather to be rejected. The language seems to be rather industriously framed to exclude such a view as that. The Regulations which are described are not to be regulations operative in Behring Sea, but the Arbitrators are to determine what concurrent regulations outside the jurisdictional limits of the respective Governments are necessary, and over what waters such regulations should extend. The whole question of the extent of the waters over which they are to go is left to the Arbitrators without any limitation whatever.

Now this interpretation therefore, if it is to be accepted at all, must be accepted upon the ground that there is some implication. Well, are you going to imply a limitation of that sort? Such a limitation would be inconsistent with the admitted purpose of the parties here. From the beginning of this controversy, this question of regulating pelagic sealing through the instrumentality of an Arbitration was originally the suggestion of Great Britain, and its first suggestion was coupled with a statement of the importance of the preservation of this race of seals, which was of importance not only to Great Britain and the United States, but to mankind. That was the ground upon which it was original y placed by Sir Julian Pauncefote, and at every stage of this controversy it has been the avowal of those who represent Great Britain that it was her supreme desire that this race of seals should be preserved and its extermination prevented.

Well, now, it would be, as it seems to me, an imputation upon the sincerity of Great Britain to say that her real intention was to protect those

seals only in Behring Sea, and if the facts should appear at some time or other that that race of seals would be exterminated unless protection was extended to them in the North Pacific Ocean as well, Great Britain would under the circumstances wish to see or be willing to see that the race of seals should be exterminated. Can the preservation of this race of seals be imputed to Great Britain, that she intended to preserve this race of seals only in case it could be preserved by regulations operative in Behring Sea? What difference does it make where it is necessary that the regulations should be operative if the important point is that these seals should be preserved and for the benefit of mankind, then they are to be preserved by regulations operative only over seas where Great Britain and the United States can give them operation, and, of course, they can give them operation all over the world as far as they are concerned.....

The President. — Outside the jurisdictional waters?

Mr Carter. — Yes, not in the three mile limit — but outside the territorial waters. If it turns out, in point of fact, regulations operative upon the North Pacific Ocean are necessary, I say it would be imputing insincerity to Great Britain to say that she did not intend or did not desire to have the race of fur-seals preserved in such a case as that. If she is sincere in her intention to preserve the race of seals, she must desire that they should be preserved by regulations which are efficient to that end, whether they are operative in Behring Sea alone or whether they are operative in the North Pacific as well. But that there is any such notion as that entertained by the parties to this Treaty is entirely inconsistent with their view as expressed in the diplomatic correspondence.

I refer to the draft convention submitted by Sir Julian Pauncefote which will be found in volume I of the United States Appendix, page 311. The fifth article of that is as follows:

> " A Commission of four Experts " two nominated by each Government and a Chairman nominated by the Arbitrators if appointed, and if not by the aforesaid Commission, shall examine and report on the following question : what international arrangements, if any, between Great Britain and the United States and Russia, or any other Power, are necessary for the purpose of preserving the fur-seal race in the north ern Pacific Ocean from extermination.

That is the first suggestion of a Commisssion of experts as a Tribunal to contrive measures for the preservation of the fur-seal. It comes from Great Britain, and the suggestion is not of measures confined to Behring Sea at all, but of measures operative upon the North Pacific Ocean as well. It was to cover not only the seals belonging to the Pribylof Islands, but the seals of Russia also. It is a suggestion of a scheme for the protection of the fur-seal all over the North Pacific Ocean. Sir Julian Pauncefote also, at a later date, on the 4th June, 1891, when the negotiations in relation to the Treaty were in progress, and had nearly been brought to a conclusion, says (and I read from the third paragraph of page 315)

> Nevertheless, in view of the urgency of the case, his Lordship is disposed to authorize me:

" His Lordship " being, of course, Lord Salisbury.

To sign the agreement in the precise terms formulated in your note of June 9th, provided the question of a Joint Commission be not left in doubt, and that your Government will give an assurance in some form that they will concur in a reference to a Joint Commission to ascertain what permanent measures are necessary for the preservation of the fur seal species in the Northern Pacific Ocean.

There again, the Government of Great Britain is pressing the Government of the United States to assent to this idea of the constitution of a commission for the purpose of making enquiry as to what prospective Regulations shall be necessary to preserve the race of seals in the Northern Pacific Ocean, no matter-where they belong.

Now Mr Whartons' answer to this I read. It is written on the same day. Page 315.

Sir, I have the honor to acknowledge the receipt of your note of to day's date, and in reply I am directed by the President to say that the Government of the United States, recognizing the fact that full and adequate measures for the protection of seal life should embrace the whole of Behring sea and portions of the North Pacific Ocean, will have no hesitancy in agreeing, in connection with Her Majesty's Government, to the appointment of a joint commission to ascertain what permanent measures are necessary for the preservation of the seal species in the waters referred to, such an agreement to be signed simultaneonsly with the convention for Arbitration, and to be without prejudice to the questions to be submitted to the Arbitrators.

That is the first direct and explicit assent of the United States given to the project of the constitution of a joint commission for the purpose of ascertaining what Regulations are necessary; and that assent contains the express statement that the measures supposed to be necessary are those operative not only in Behring sea, but in the North Pacific Ocean. That is the way in which it was understood after the Treaty was signed and ratified. On the 15th January, 1892 which was after the Treaty had been signed, but before the ratifications had been exchanged, — and I read now from the report of the Bristish commissioners No VII.

The President. — Do not you make a mistake in point of date? I believe the Treaty was only concluded at Washington on 29th March.

Mr Carter. — That is when the ratifications were exchanged. That is when it was ratified. But it was signed by the parties in December.

The President. — I do not think so.

Mr Justice Harlan. — Yes, on the 18th December.

The President. — The ratification was advised by the Senate on March 29th; ratified by the President on April 22nd; and ratifications exchanged on May 7th.

Mr Justice Harlan. — Mr Carter means the formal articles which went into the Treaty about the Commission were signed on the 18th of December.

Mr Carter. — The two agreements signed by the diplomatic representatives of the parties, namely, the agreement for the Arbitration and the agreement for the Joint Commission, were signed on December 18th, and

you will remenber that the Commissioners agreed to be appointed were appointed before the Commission was finally ratified.

Now, Lord Salisbury, on the 15th of January, 1892, addresses a letter of instructions to the British Commissioners; and I will read from that letter, — the second enclosure referred to in the preliminary Report.

You will observe that it is intended that the Report of the Joint Commissioners shall embrace recommendations as to all measures that should be adopted for the preservation of seal life. For this purpose, it will be necessary to consider what regulations may seem advisable, whether within the jurisdictional limits of the United States and Canada, or outside those limits. The regulations which the Commissioners may recommend for adoption within the respective jurisdictions of the two countries will, of course, be matter for the consideration of the respective Governments, while the Regulations affecting waters outside the territorial limits will have to be considered under clause 6 of the Arbitration Agreement in the event of a decision being given by the Arbitrators against the claim of exclusive jurisdiction put forward on behalf of the United States.

The Report is to be presented in the first instance to the two Governments for their consideration, and is subsequently to be laid by those Governments before the Arbitrators to assist them in determining the more restricted question as to what, if any, Regulations are essential for the protection of the furbearing seals outside the territorial jurisdiction of the two countries.

Senator Morgan. — Have you that clause before you?

Mr Carter. — Of the Treaty?

Senator Morgan. — No, it does not say of the Treaty, as I understand, but of one of these Agreements.

Sir Richard Webster. — It is the same thing. It is now Clause VII of the Treaty.

Senator Morgan. — I wanted to know if it was identical with Clause VII of the Treaty — Clause VI mentioned in that letter.

Mr Carter. — Yes, it is substantially identical, I believe exactly.

Mr Justice Harlan. — Yes, it is.

Senator Morgan. — Is it known at whose instance that 6th Clause was made the 7th. article of the Treaty?

Mr Carter. — Well, when they came to put the Agreement for the Arbitration and the Agreement for the appointment of the Joint Commission into one document, which is the Treaty, then it became necessary to make that change. That consolidation of the two instruments made that change necessary as I suppose.

The President. — General Foster, there was a remodelling of the Treaty after this first signature of the 18th Dec was there not?

General Foster. — Afterwards, when they came to complete the Treaty, they remodelled it by inserting these two agreements, but in numbering the Treaty the first five questions became Article VI of the Treaty, and the next, as to Regulations, following became Article VII of the Treaty; it was simply in the enumeration of the Articles of the Treaty that it became Article 7.

The President. — And it was after Decemher 18th, but before February 29th.

General Foster. — Yes.

The President. — But there was no substantial change in the text.

General Foster. — No change whatever in the language, but simply in the numbering of the Articles and the designation of them.

Mr Carter. — I have read from documents showing what the interpretation of Great Britain was in these particulars, and I will now call your attention to a document showing the interpretation of the United States. The commissionners there refer to the letter of the Secretary of State appointing them.

In your letter of July 10, 1891, received by us in San Francisco on the 16th, after referring to the diplomatic controversy pending between the United States and Great Britain in respect to the killing of fur-seals by British subjects and vessels, to the causes which led up to this controversy, and to some of the propositions which had at that date been mutually agreed upon, you inform us that the President has been pleased to appoint us to proceed to the Pribilof Islands, and to make certain investigations of the facts relative to seal life, with a view to ascertaining what permanent measures are necessary for the preservation of the fur-seal in Behring Sea and the North. " Pacific Ocean ".

[The Tribunal then adjourned for a short time.]

The President. — M. Carter, will you proceed.

Mr Carter. — Another evidence, Mr President, tending to show that in the contemplation of the Treaty regulations were not to be limited to Behring Sea, is found in the change in form of the sixth question. As originally proposed, it was in this language. I read from page 286 of the 1st volume of the Appendix to the Ameriean Case

VI. If the determination of the foregoing questions shall leave the subject in such position that the concurrence of Great Britain is necessary in prescribing regulations for the killing of the fur-seal in any part of the waters of Behring Sea, then it shall be further determined,...

and so forth

You will observe there that the language is, " Regulations for the killing of the fur-seal in any part of the waters of Behring Sea", giving some ground for the suggestion that the regulations were to be confined to Behring Sea; but after the correspondence which I have referred to, in which it was indicated on both sides that there was a necessity that the regulations should extend outside of Behring Sea, or that there might be a necessity for their extension outside that, the form of this Article was changed; and on page 319 of the same volume will be found the suggestion of it in its changed form, and as it was finally adopted, in the note from Mr Wharton to Sir Julian Pauncefote, where he says :

I am now directed by the President to submit the following, which he thinks avoids the objection urged by Lord Salisbury :

(6) If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of regulations for the proper protection and the preservation of the fur-seal in, or habitually resorting to, the Behring Sea, the arbitrators shall then determine...

and so forth.

Now the language is " or habitually resorting to," indicating that the protection was to extend to the seals resorting to Behring Sea, wherever it might be necessary that those regulations should be operative ; and that was the form in which it was finally adopted.

Now, I have, finally, (for the purpose of shewing that the Regulations are not necessarily to be limited to Behring Sea), to point to the Report of the British commissioners themselves. They agree themselves that these Regulations should be operative on the North Pacific Ocean, and indeed every where where the seals go — and not confined to Behring Sea. The prohibitions upon pelagic sealing, which they themselves in their Report impose (which Report is made part of the case of Great Britain here), are to the effect that the prohibitions of close time shall apply not only to the waters of Behring Sea, but to the waters of the North Pacific as well. We may therefore, I think, conclude that according to the true interpretation of this Treaty the arbitrators, in the framing of regulations, are not confined to Behring Sea at all, but may make them apart, and must make them apart (if it is necessary), over the waters of the North Pacific as well.

Now as to the necessity, there can be no manner of doubt. Touching that necessity, I allude to a letter addressed by W. C. Hawkins to the Marquis of Salisbury on the 29th of April 1891, and which will be found in the latter part of volume III (U. S. n. 3. 1892) of the Appendix of the British Government, case, page 5. Mr Hawkins there says :

My Lord,

In consequence of the negociations being carried on betwen the United States Government and our own to bring about a satisfactory settlement of the Behring's Sea Seal Fishery question, I beg to offer you the following facts, trusting they may be useful to you as emanating from one with a practical knowledge cxtending over a period of eighteen years.

I also inclose herewith a cutting from the " Daily Chronicle ", of the above date, which induces me to take this liberty, supposing the statement therein detailed to be correct.

Since about the year 1885 we have received in this country large numbers of seal skins known in the trade as north-west coast skins, the same having been taken in the open sea, and, from appearances that are unmistakable to the initiated, are exclusively the skins of female seals pregnant; these are all shot, and I have been informed that for every skin recovered five or six are lost through sinking when struck by the shot; this wholesale slaughter of the females will, in a short time, bring about the extermination of the seal in that district if not arrested.

Now that letter was referred by Lord Salisbury to the Canadian Government, and there was a report made by the Privy Council of that Government. That is found on page 75 of the same part of the British Appendix. It is the :

Report of a committee of the Honorable the Privy Council, approved by his Excellency the Governor-General in Council on the 27th. June 1891.

The Committee of the Privy council have had under consideration certain papers from the Colonial Office on the subject of the seal fishery in Behring's Sea.

The Minister of Marine and Fisheries, to whom the matter was referred, observes

that Mr Hawkins states, since about the year 1885 we have received in this country (England) large numbers of seal-skins, known in the trade as the north-west coast skins, the same having been taken in the open sea, and, from appearances that are unmistakable to the initiated, are exclusively the skins of female seals pregnant; these are all shot and I have been informed that for every skin recovered five or six are lost through sinking when struck by the shot...

Then two paragraphs further down the Reports proceeds :

The Minister submits that the testimony produced by Mr Hawkins, in this connection is quite in accord with the information hitherto obtained, and is most valuable in support of the contention of Canada. It has been previously pointed ont that although great stress had been placed by the United States Government on the alleged necessity for prohibiting pelagic sealing in the Behring's Sea, yet no attempt had ever been made by that Government for an arrangement to curtail similar operations along the coast previous to the entry of seals into that sea.

In an attempt to vindicate the methods of the lessees of the seal islands, Mr Hawkins proceeds : "We on the other hand, during my experience have had annually large numbers of seal-skins from Alaska, and also from the Copper Islands, which are killed by being clubbed on land, and are selected with judgment, being the skins of young male seals : the older fighting or breeding males are spared.

This is another presentation of the case of the United States Government for the prohibiting of every other character of sealing but that adoped by the lessees, so frequently combated by your Excellenciys advisers. While the Minister of Marine and Fisheries does not deem it necessary to dwell at any length upon the point, he would, in passing, invite attention to the fact that, notwithstanding this statement, the United States Treasury agents now assert the contrary, and the Government of the United States appear to be acting on the Reports of their Agents.

Now, omitting the next paragraph, I will take up the one following :

The Minister submits that whatever significance Mr. Hawkins statement may have upon the abstract question of the protection of seal life in the Pacific waters, it can have but little, if any, on the controversy between Great Britain and the United States, as the evil complained of, even if as great as alleged, occurs outside the disputed area, as he himself implies in his reference to the northwest coast skins.

Therefore it appears from that that the principal danger to the seals lies outside the Behring Sea and in the North Pacific Ocean.

Now I will read some evidence, having the same tendency, from the Report of the British Commissioners page 22, section 138 :

If certain months should be discussed as a close time for sealing at sea, it be comes important to inquire which part of the season is most injurious to seal life in proportion to the number of skins secured, and to this inquiry there can be but the one reply, that the most destructive part of the Pelagic catch is that of the Spring, during which time it includes a considerable proportion of gravid females, then commencing to travel on their way north to bring forth their young. It is on similar grounds and at corresponding seasons that protection is usually accorded to animals of any kind, and, apart from the fact that these seals are killed upon the high seas, the same arguments apply to this as to other cases.

That represents the most destructive part of the pelagic catch to be that of spring, when gravid females mostly are taken on their way to the islands.

Now on page 23, section 145, the same Commissioners say :

From the foregoing review of the various facts and circumstances of seal life in the North Pacific, the following may be stated to be the governing conditions of proper protection and preservation :

(*a*) The facts show that some such protection is eminently desirable, especially in view of further expansions of the sealing industry.

(*b*) The domestic protection heretofore given to the fur-seal on the breeding islands has at no time been wholly satisfactory, either in conception or in execution, and many of its methods have now become obsolete.

(*c*) Measures of protection to be effective must include both tbe summer and winter homes, and the whole migration ranges of the fur-seal, and control every place and all methods where or by which seals are taken or destroyed.

Now they say in paragrah 6, section 155, which will be found on page 25 :

A close season to be provided, extending from the 15th September to the 1st May in each year, during which all killing of seals shall be prohibited, with the additional provision that no sealing vessel shall enter Behring Sea before the 1st July in each year.

So that we see that not only in the contemplation of the parties to the Treaty is there no ground for the suggestion that the regulations are to be limited to Behring Sea, but they are to be made operative wherever the necessity requires it; and we have, besides, a recognition that necessity does require the operation of these regulations for the North Pacific, as well as in Behring Sea.

Now having disposed of the limitations sought to be imposed upon the Tribunal in respect to its contriving regulations for the preservation of the seals, I come now to what the real problem is. What is the real problem before this body? They are to contrive such Regulations as are necessary for the preservation of the fur-seals. Whatever is is necessary to that end must be recommended, no matter what it is; no matter where it is operative; no matter what may otherwise be its effect — whatever measures are necessary for the purpose of accomplishing that object.

Now of course it is not to be supposed that *all* taking of seals is to be prohibited, because that would be to deprive mankind of the benefit of the animal. We must assume, of course, that the intention is that the benefit of the animal should be secured to mankind, and the taking so regulated as to prevent the extermination of the species. How is that to be accomplished? Well, the solution of the problem of course requires a study of the nature and habits of the animal; the methods by which it is pursued and captured; the perils to which it is exposed, and the means which are best adapted to protect it against those perils. Those are the things to be considered. But those are the very things which arise for consideration in considering the question of property. Those are the very same topics which I have discussed, and discussed at great length in considering what the question of property was; and the conclusion was that for the purpose of securing to mankind the benefit of the animal, and at the same time preserving the species, it was necessary to award to the United States which had a constitution — a territory — which gave it a natural control over the animal, the benefit of the rights of property. That was the conclusion. It was the same problem precisely; and it is the same problem upon which human society has been engaged from the

dawn of civilization to the present day — How can the races of animals, useful to man, be preserved; the benefits which they are susceptible of affording be secured to man; and at the same time, the stock not destroyed? That, as I had occasion to show was the problem upon which human society had, from the beginning, been engaged, in the solution of which, in all cases, they are to award the rights of property to those who had such a control over the animal as enabled them to secure and apply to the uses of mankind the animal increase, and preserve the stock. How else can the problem be solved? How can you preserve to mankind a race of domestic animals unless you award property to those who have such a control over him that they can destroy him at a blow? The United States have that control over this animal. He comes upon their soil — remains there five or six months during the year — voluntarily submits himself to their power, so that they can, if they choose, destroy him almost at once. How can you preserve that race, except by inducing the power that has this control and has this right of destruction and this power of destruction, to withhold the exercise of it. And how can you induce them to with hold the exercise of it except by awarding to them the benefit of the rights of property? if you will allow to them the reward of their abstinence — if you will call upon them to exercise care, industry, and self-denial, and so preserve the stock, and as a recompense for it, give them the benefits which comes from a sale of the product, then you can have the race preserved — otherwise not. Therefore I say that this problem of contriving regulations is only the problem, otherwise expressed, which arises in considering the question of property.

Now the question of property is assumed, for the purposes of this argument to have been decided, and to have been decided adversely to the United States, so that we have not that precise means of preserving the species. But that does not change the nature of the problem at all, nor does it change any of the facts in the case. If the United States have no property so as to permit them to preserve the animal, and you have to come to the adoption of regulations to be concurred in by both Governments to accomplish that preservation, you must do the same thing which an award of the right of property amounts to — that is to say, you must permit the United States to take the increase of the animal, and prevent, by regulation, all other nations from interfering with the animal at all. There is no other way you must accomplish, by regulation, the same ends which an award of the question of property would accomplish; and you can only accomplish it by the same means or what is tantamount to the same means.

Senator Morgan. — Do you regard the words " protection " and " preservation " in that 7th Article of the Treaty as being strictly synonymous?

Mr Carter. — I rather think that I have so regarded them, — " for the proper protection and preservation. " I think those are two words used, not precisely as synonymons, but substantiallv so; — two terms in-

tended to cover the whole idea. I do not think any precise distinction is attempted to be made in them; but two words are employed to cover more fully the notion that these seals were to be preserved by being protected. We cannot, in this enquiry, lose sight for an instant of what the laws of nature are. They are the very object of our enquiry. These seals are subject to the operations of the laws of nature. Their increase and their decrease inevitably follow rules which arise out of those laws; and in order to arrive at means and measures which are necessary for that protection, we must ascertain them, and, when we have ascertained them, we must implicitly obey them. There can be no tampering with the laws of nature. Any violation of them inevitably draws after it the mischievons consequences which are attached to violation; and if we under take to say that we can proceed contrary to those laws in any particular, so far as those laws involve the preservation of the seal, the disastrous consequences will be drawn after it.

Now, here, in my view, is really an end to legitimate debate in this matter; any further argument must proceed upon the assumption that there is some sert of doubt as to whether the pursuit of seals upon the high seas in the manner adopted by pelagic sealers is destructive or not. I have argued that question before. It is as clear as anything can be that it is destructive. It is not possible to attack the females in the way in which pelagic sealing attacks them without its being destructive in its consequences.

Now, there are two things here that are beyond dispute; first, that the young and non-breeding males may be taken, up to a certain point, without diminishing the birth-rate, and the taking of any females must diminish that rate *pro tanto* and must, therefore, be in its effect destructive. This does not depend upon scientific hnowledge at all; it depends upon common knowledge and common information which all men are alike possessed of. Suppose the race of sheep could not be cultivated except in four places in the world, and that the entire demand of the world had to be satisfied with the product which could be produced at those places Could, under the circumstances, any female sheep ever be killed? Very plainly not. Every one of them must be preserved, and the demand, of course, would make it profitable to preserve every one of them, just as it is in the case of seals. If you kill a single female seal, you must to that extend diminish the product which will arise. Of course, sheep can be produced in every quarter of the globe, and the market glutted at pleasure at any moment with them. It is perfectly practicable and perfectly proper to kill female sheep and to kill them whenever it is not profitable to increase the stock of sheep any more. That condition of things never arises in the case of seals.

The demand so far exceds the supply and is so prodigious, that there is a demand for a much larger supply than can be furnished on the part of everybody in the world; and, therefore under the circumstances, the markets cannot be satisfied without you preserve carefully and sedulously

every female seal. Under the circumstances, then, what is the attitude of the United States as to this? It is this; that it can propose no regulations save one, and that is an absolute prohibition on killing all seals anywhere upon the seas, having the killing entirely upon the Islands where the amount of the increase can be ascertained and the superfluons males separated from the rest of the herd, and taken and devoted to the commerce of the world without endangering the destruction of the stock. That simple regulation is necessary, and I would say absolutely necessary in its entire totality to the preservation of these animals. If we were to propose any regulation at all, it would have to be some such one as this. That pelagic sealing should be limited to the months of January and December; in other words, to the winter months, when no sealers can go out and when the seas are so rough that they would not undertake such an enterprise, and when the seals could not easily be found. Such a regulation as that might be satisfactory enough; but it would theorelically and in form tolerate pelagic sealing. Still, it would be, in fact, prohibition; and it would be insincere to present any such scheme as that as a regulation, because it is prohibition, and it is best at once to say that the prohibition should be made absolute, and that pelagic sealing should not be indulged in, even in form, at any time or under any circumstances.

Now, I say we are able to present no scheme, but perhaps and ought, out of compliment to the other side, and out of compliment, perhaps, to these British Commissioners, who have proposed a scheme, to consider what that is; and I suppose we may say that if it is possible to retain pelagic sealing to any extent under regulations which shall not endanger the race of animals — if any scheme having such an effect as that is possible, these Commissioners could find it out and give it to us. They have presented a scheme. They have made the subject a study, a profound study, I suppose, and if the problem is capable of any solution which shall preserve pelagic sealing at all, we may safely assume that they have found it out; and perhaps I ought to consider what their scheme is, and see whether it is calculated in any degree to accomplish the end in view. Now, I have cited it at page 201 of the argument of the United States, and the whole of it I have given you. It begins with section 155 of their report.

> In view of the actual condition of seal life as it presents itself to us at the present time we believe that the requisite degree of protection would be afforded by the application of the following specific limitations at shore and at sea :
>
> *a*) The maximum number of seals to be taken on the Pribiloff Islands to be fixed at 50,000.
>
> *b*) A zone of protected waters to be established, extending to a distance of 20 nautical miles from the islands.
>
> *c*) A close season to be provided extending from the 15th September to the 1st May in each year, during which all killing of seals shall be prohibited, with the additional provision that no sealing vessel shall enter Behring Sea before the 1st July in each year.
>
> 156. Respecting the compensatory feature of such specific regulations, it is believed that a just scale of equivalency as between shore and sea sealing would be

found, and a complete check established against any undue diminution of seals, by adopting the following as a unit of compensatory regulation :

For each decrease of 10,000 in the number fixed for killing on the islands, an increase of 10 nautical miles to be given to the width of protected waters about the islands. The minimum number to be fixed for killing on the islands to be 10,000, corresponding to a maximum width of protected waters of 60 nautical miles.

157. The above regulations represent measures at sea and ashore sufficiently equivalent for all practical purposes, and probably embody or provide for regulations as applied to sealing on the high seas as stringent as would be admitted by any maritime power, whether directly or only potentially interested.

There is their scheme. Its features are these : First, a limitation of killing on the islands down to 50,000 seals; secondly, a protected zone of 20 miles around the islands at all times, with a scheme for increasing that by increasing the protection 10 miles for every reduction of 10,000 which might be made in the killing upon the islands; that is to say, if the number was to be reduced to be killed on the islands from 50,000 to 40,000 then the protected area would be 30 miles in diameter.

If it was carried to 30,000 then it would be 40 miles in diameter; if to 20,000 then to 50 miles in diameter; and if to 10,000, why, to 60 miles in diameter. And if it was absolutely prohibited, so that there was no killing upon the islands at all, then you might have a protected area of 80 miles in diameter. They do not say that. They say the reduction of killing on the islands is to be limited, but you must kill, at least, 10,000. Then they propose a close season, extending from the 15th of September to the 1st of May in each year, during which all killing of seals in Behring Sea and elsewhere is to be prohibited. That would be to allow killing during May, June, July, and August, and down to the 15th of September, as they say, for the preservation of the seals.

Now I have several observations to make on that and the first is that it begins by a restriction on killing on the islands reducing that from 100,000 as it is now to 50,000, but that, these Arbitrators have no power to do. The regulations which they are permitted to frame must be regulations operative outside the jurisdictional limits of the two Governments. They have no authority to make any regulations which restricts the action of the United States upon its own soil.

That was never thought of by either of the Governments in framing the Treaty. The United States is to be free in its own actions on its own soil, but this regulation assumes that you are to cut down the number to be killed there to 50,000. That leading feature of it being inadmissible the whole thing is inadmissible. Let me pass that however for a moment and try this scheme upon its merits as a scheme for the preservation of the seal and let me assume that no objection is taken to this reduction of the amount of slaughter upon the islands. Well how will it stand then? As it is now there are say 150,000 seals taken every year, or 160,000 probably, about 100,000 on the islands, and 60,000 to 70,000 taken by pelagic sealing besides what are lost. That it is admitted is ruinous. That, it is admitted, involves the destruction and probably the speedy destruction

of the herd. This is supposed to accomplish a different result. That is to say, it is supposed to accomplish less destructive work than would be effected by the taking of 100,000 young males on the islands and 60,000 or 70,000 females upon the sea.

Well now how many females can you safely take without destroying this herd, for that is the question? Pelagic slaughter is levelled mainly at females. The great body of the pelagic catch is females as we know. How many of them can you safely take without destroying the herd? That is a problem to which these Commissioners have not given their attention at all. They have evaded that. But that was the main thing for them to consider. They could not come to any conclusion that any particular scheme of regulations would preserve this herd without inquiring how many females it took and whether the herd could stand it. Now they have come to one conclusion already which I think is a starting point from which we can operate.

Then have said at section 60 of their Report which is found on page 11 :

> From the circumstances above noted, the maintenance of seal life in the North Pacific was threatened and reduced to a critical state in consequence of the methods adopted on the breeding islands where the seals were drawn upon annually to, and even beyond, the utmost limits possible apart from depletion; and where, in consequence of the enlarged season of commercial killing and the allowance of " food killing " during the entire time in which any seals resorted to the islands, these animals had practically no undisturbed season of respite. At this time a new factor also tending towards decrease appeared in the form of " pelagic sealing ".

That is to say their position is that prior to the introduction of pelagic sealing and when the herd was subject to no destruction except of its natural enemies, and killing upon the islands, the killing of 100,000 males upon the islands was more than the herd could stand, and that that species of killing had brought the herd into a critical condition prior to the practice of pelagic sealing.

Of course, there is a point beyond which you cannot go in the taking of young males; you must leave enough for the purposes of the herd. What is that point? The Commissioners say 100,000 is too many. The United States say, " No, we do not think 100,000 is too many " but, at the same time, they say that you could not probably carry it much beyond that. Take the British Commissioners' own view, that the taking of 100,000 is more than the herd would stand. If the herd cannot stand the annual loss of 100,000 young males, what loss of young females can it stand? Here you have a species of highly polygamous animal; one male with from 20 to 30 females; and, if the herd cannot stand the loss of 100,000 males, it must be obvious that it cannot stand the loss of 50,000, nay, not more than 20,000 young females on their own hypothesis. That must be certainly true. Now, what assurance have you under this scheme, limiting the pelagic sealing in this manner, that there will not be at least 20,000 or 30,000, or even 50,000 females still

taken? There is no restriction on pelagic sealing placed from the 1st of May till the 15th of September, except the protected area of 20 miles round the islands; all the rest of the sea, — Behring Sea and the North Pacific Ocean as well — are throw open.

Sir Charles Russell. — Except that no vessel is to enter Behring Sea.

Mr Carter. — Until the 1st July, yes.

How do you know that that will not result in the taking of as many females as there are now? Why it is certain that it would result in that. I wish to call the attention of the Arbitrators to a provision of this very scheme, which makes it as certain as any future thing can be certain, that under this scheme of destruction, the females, so far from being diminished, would be increased, because pelagic sealing would be immensely increased. Their scheme is, you must cut down that supply of the market which is now furnished by the Pribilof Islands to the extent of 50,000. Those are taken out of the market at once. What effect has that on the price? Why to prodigiously increase it. The price has been steadily advancing for years. Upon the last accounts, it was 100 shillings a skin, affording a prodigions profit upon any seals taken. With the force of pelagic sealers now engaged in those waters, they can secure 60,000 to 70,000 skins a year, and that force has been continued every year, and if there are no other inducements offered than those in the market, and without regard to the reduction of the supply from the Pribilof Islands to 50,000 — if we take things as they now exist, we know that pelagic sealing is going to continually increase and rapidly increase, because it has been rapidly increasing all along — all you want to do to make the supply of seals taken by pelagic sealing as large as before, is to put on a few more sealing vessels that is all. What was done in five or six months must now be done in three or four. That is all the difference that there is. Is it not absolutely as certain as anything can be that, with the enormous profit that there is upon every skin taken by a pelagic sealer, there will be an abundance more of vessels fitted out for their work? Of course, that is certain.

Therefore, it is not only they have made no provision here for the restriction of the number of the females taken, but they have made provisions which will vastly increase the numbers taken. These provisions are not for the preservation of the fur-seal; these provisions, which begin by cutting down the supply which is taken from the Pribilof Islands, — these provisions which make a rise of the price of the seal-skin in the market and tempt the investment of more capital and the employment of more men in pelagic sealing are provisions not for the preservation of seals, but for the cultivation, the stimulus and the encouragement of pelagic sealing. That is their character upon the face of them.

Now, let me take another feature of it; and that is, this sliding scale that they have, enlarging the area, round the island, of pro-

tection provided you will reduce the amount of slaughter upon the island. For every 10,000 that you reduce the number of seals killed upon the Island, you are to have an additional protection of 10 miles. What does that amount to? It is a provision having the same effect. If the purpose was to stimulate pelagic sealing, a contrivance could not be designed that was more effective for the object, than cutting down the supply that comes to the market from the Islands first to 40,000, then to 30,000, then to 20,000, and then possibly to 10.000. When you get it down to 10,000, then the whole supply of the market practically depends on pelagic sealing; and, of course, the stimulus to that pursuit is prodigiously increased. This is the prominent feature of these regulations. I say the prominent feature of these regulations is the new stimulus it affords to pelagic sealing by cutting down the supply which comes from the Pribilof Islands, the demand being the same, of course, all the time.

Now, to take another feature of it. Of course, taking at the Pribilof Islands is much less expensive than it is anywhere else; and, consequently, the skins can be offered to the world at a less price. The greater the expense attending the capture of the seal, the greater the price, of course, in the market will be, because the demand so largely, exceeds the supply. Now as these successive restrictions are placed upon pelagic sealing requiring an additional number of vessels and an additional supply of men in order to produce the same result in the taking of seal-skins so that the same number may be got, the expenses will necessarily increase. Then who pays those expenses? Why, the consumer, of course; because it goes into the price. You cannot increase the expense of gathering a property without it falling upon the consumer.

Then there is another point; who will protect this prohibited area of 20 or 30 miles? It must be done by armed cruisers. Of what power? Presumably, of the United States, as nothing is said to the contrary. But suppose Great Britain undertook her share of the expenses, it would require in that scene of perpetual disturbance, to make the protection of that zone complete, in order to prevent the extrance into it by any pelagic sealer, a very considerable force of vesels; not two, but half a dozen, or a dozen at least, armed vessels which must be sent there by Great Britain or the United States for the purpose of enforcing that prohibition.

What is the expense of that? An expense not measured by 100,000 dollars but by many hundreds of thousands probably 1,000,000 annually expended under this scheme for the purpose of enforcing one of these prohibitions which is a most difficult one to enforce because the pelagic sealer has a right to be on the sea and to go up to this prohibited area. The presence of a pelagic sealer on the sea with appliances is nothing illegal in itself. It is not as if it were absolutely prohibited, and when you find a vessel you can catch her because

she has the appliances on board. But she has the right to be there and the business of the Government is to keep her out of this prohibited area. Conjecture only can furnish us with a notion of what the cost will be. I cannot see how it would be less than 1,000,000 dollars. That has to be paid and by whom? Both by the consumer and the tax-payer and that affects the two powers. It is derived of course by taxation. Therefore it is between the consumer and the people of the two nations.

There is an immense sum of upwards of 1,000,000 dollars to be expended for this purpose and for whose benefit? For the benefit of the United States? No. For the benefit of Great Britain? No. For the benefit of the people who consume seal skins? No, it is a damage to them, because they have to pay more under that system than they would under any qther. Then for whose benefit is it? Why for the benefit of people engaged in pelagic sealing, and in consequence of whose acts the seal herd will be exterminated in a few years. It is for the benefit of these people that they will be placed or partly for them and partly for people who want seal skins. It seems to me that such a thing is too preposterous for serious consideration.

Now I say that these Commissioners have studiously avoided the real problem before us which was to be first ascertained, how many females you can take without working a destruction of the herd. That is the problem which has been solved upon the islands. The enquiry there has always been, how many young males can you take for the purpose of supplying the markets of the world, and yet not endanger the existence of the herd — an enquiry carefully prosecuted, upon the solution of which all the lights derivable from a very long experience have been brought to bear; and they came to the conclusion that you can take up to 100 000 young males without endangering the existence of the herd. You must not go beyond that; and there the taking has been stopped, the similar problem these Commissioners should have attempted to solve — how many females can you take from the herd without destroying it— they have not attempted to solve. If they had, the fallacy of their own solution would have stood self-exposed and in two directions. In the first place they could not tell how many. Could they safely say that even 5 000 females could be taken without tending to destroy the herd, and without in the end, at a period more or less remote, the destruction being fully effected? They could not say that even 5 000 would not have that effect. From all the evidence in the case, and from the very careful reasonings which have been entered into by the American Commissioners, I think the conclusion is entirely a safe one that 5 000 females could not be thus taken, because, theoretically, of course, you cannot take one without doing it.

Now if you take 5 000 annually every year, the number 5 000 must be each year subtracted from a constantly diminishing *minimum* and of course the rate — the proportionate amount of the taking, increases in

a ratio far more rapid than the arithmetical one, the destruction which would be accomplished at the first might be perhaps slight; but it is greater and greater each year and finally reaches a figure at which its disastrous and its destructive proportions become perfectly manifest. But if they had said that you could take 5 000 or 20 000, they would still have been confronted with another difficulty equally insuperable. How do they know that the arrangement which they propose would actually limit the number of captures to the number they propose? They have no means of ascertaining that? No means are possible. They cannot limit the taking to males; to that all are agreed. The taking must be indiscriminate at all times and under all circumstances. There is no method of making any distinction. How can they tell that when the cupidity of man is aroused by the stimulus which a large profit would afford them, a fleet, not of 50 vessels but 100 vessels, would be upon the seas during this time which is allowed and capture not 60 000 seals, but 100 000, or 150 000. That is perfectly probable, or, at all events it is perfectly possible, and far more probable than any other result.

Now one would suppose that in suggesting these regulations they would have paid some attention to their own conclusions as stated in other parts of their Report. They have considered this question of taking females. It has been pressed upon them very much. They have ventured to say that the taking of a female is not necessarily injurious. She may be barren and then it is not injurious.

Well that is true. There could not be any damage to take a barren female, but who can tell what females are barren and what are not?

Nobody, except Mr. Elliott, whose Report my learned friends wished very much to get in and perhaps have got in. He knows; he can tell a barren female from others, he has been on the Islands, and has counted them; and ke makes 250,000 of them. But no one else can tell. These commissioners were on the Island, and could not tell how many there were, or that there were any; but I agree, if they could confine the taking to barren females, it would not do so much damage. But it cannot be so confined, and they do not pretend so to confine it.

What is their own view of taking females that are not barren. They have expressed it thus — I read from section 80 of their Report, which is on page 13 :

" 80. To assume that the killing of animals of the female sex is in itself reprehensible or inhuman, is to make an assumption affecting all cases where animals are preserved or domesticated by man. Most civilized nations, in accordance with the dictates of humanity as well as those of self-interest, make legislative provision for the protection of wild animals during the necessary periods of bringing forth and of rearing their young ; but the killing of females is universally recognized as permissible if only to preserve the normal proportion of the sexes. "

That is true, indeed, in cases where the animal can be cultivated in all parts of the globe at pleasure; but very untrue where you can cultivate it only in a very few particular spots.

This is the case in all instances of game preservation and stock raising, and in

the particular example of the fur-seal, it is numerically demonstrable that, in maintaining a constant total of seals, a certain proportion of females should be annually available for killing. The killing of gravid females must, however, be deprecated as specifically injurious, and in any measures proposed for the regulation of seal hunting should receive special attention.

What attention have they given to it here? What provisions have they made or suggested for the protection of gravid females? None whatever; and of course none can be suggested. But why is the killing of a gravid female more specifically injurious than the killing of another female? I cannot myself perceive the difference. The two-year-old female of to-day is not gravid, but if she is killed, the possibility of the existence of a gravid female is prevented. You only anticipate the destruction by the period of a year. The absolute amount of the injury is almost the same in its destructive character upon the herd. Not exactly the same, but it is the same in its nature and almost the same in amount.

Now then, we see what these regulations are. How are they to be described? What the Treaty requires is regulations necessary for the preservation of the fur-seal. Are these regulations for the preservation of the fur-seal? No; they are regulations designed to secure the more speedy destruction of that race. That is what they are. Their chief feature is to permit pelagic sealing, and to increase, and prodigiously increase, the stimulus which is offered for the pursuit of it. They are regulations not for the protection and preservation of the fur-seal, but for its destruction — and for its destruction in the most inhuman and shocking form. For it cannot be disguised that this business of pelagic sealing is pregnant with enormities which we do not like to consider; and it comes in the shape, as it were, of an invitation on the part of Great Britain to the United States to engage with her in this work of destruction. She asks her to abolish this mode of taking seals, or to diminish it, cut it down as much as possible, which is at present pursued upon the Islands; to forego in great part that mode of taking the seals which is consistent with the preservation of the herd, which is agreeable, as far as the killing of animals can be made agreeable, to the impulses of humanity. She asks her to forego that and engage with her in this destructive slaughter upon the seas. She is made to say to the United States : "Blot out from your statute-book those laws which declare the killing of female seals to be a crime; forget those precepts of the law of nature which teach us that the killing of female seals under such circunstances, or that the destruction of any useful race of animals, is a crime. Forget those precepts and come and engage with us in this work of destruction upon the high seas. Come, together with us, and let us tear open the bellies of these gravid females, just ready to bring forth, and let their bleeding and crying young fall on the decks. Come with us, and slaughter these nursing mothers out at sea in search of food, and let their miserable offspring perish on the shore. Come with us, and make our decks

run red and white with blood and milk." These seem to be the regulations which Great Britain, a great and humane nation, is made to tender to the United States as being those to which she is prepared to yield her concurrence.

These propositions really seem to me to contain enormities which actually shock the humane sense of mankind. There is no economic result to be attained by them. There is no useful result to be attained by them. They are destruction, and nothing but destruction; and it is destruction accompanied with every species of enormity.

Mr President, I have argued heretofore in the course of my argument, and I cannot too often insist upon it, that the duty of preserving the useful race of animals belongs to that nation or to that people which has such a control over them that they can take and apply the annual increase and benefit of the animal to the uses of mankind, and at the same time to preserve its stock. It is their duty, because they have the power to perform it, and because self-interest furnishes them with a sufficient motive to insure its performance. Nature has so linked together duty and self-interest as to make the gratification of the one assure the performance of the other.

It was thought, the United States at one time believed, that this was their duty, and that they should persist in their efforts to perform it. There are those who thought, and who still think, that that duty should never have been relinquished by the United States, but that she should have performed it at all hazards, even though she had been obliged to meet the three quarters of the globe in arms. If she had attempted its performance with the full exertion of all her power, and calamitous consequences had resulted, the humane sentiment of mankind, the enlightened sentiment of the world, history in her final award, would have charged the responsibility for those calamities upon that nation or upon that people who had refused to be bound by those natural laws which ought to be the rule governing the intercourse between nations.

But other counsels were followed; and a different course was pursued. The United States, abominating war, viewing hostilities, especially with a power kindred in speech and blood, with unspeakable dread, always inclined to pacific measures, when a Tribunal was offered to them, composed of the selected wisdom of the world, for the determination of the contention between her and Great Britain, could not help accepting that offer, and forbearing from any further efforts of her own in enforcing her rights, and discharging the corresponding duty for the preservation of this race of animals, which had been imposed upon her by her situation and by her advantages. That duty she has relinquished, but although the duty has been relinquished, it has not been extinguished. It has only been transferred from the United States to others. It has been transferred to the members of this Tribunal; and it remains for them to discharge this great duty of preserving this useful race of animals. It is made their duty by the terms of the Treaty itself. The United States has retired

from the field, and withheld any further exercise of their power. That duty is one which it is perfectly easy to perform. There is no difficulty about it whatever. The destruction of this race of seals is wholly, absolutely, unnecessary. It can be easily, certainly preserved, either by an award of property or by the establishment of regulations tantamount to an award of the right of property, which shall prevent any slaughter of the species by other nations and other citizens, and remit the entire taking to the Islands, where that taking can be carried on consistent ly with natural laws.

If the decision of this Tribunal shall be in accordance with those great laws which I have attempted to lay down and to support, it will remain a guide, an instructive guide, for present and for future times in the adjustment of similar controversies. If it shall be otherwise decided, it will of itself be a new source of strife and contention, and will add to the difficulties, already sufficiently great, in which nations are likely occasionally to be involved. I cannot doubt that this duty, this high responsibility, will be discharged by this Tribunal resolutely, faithfully, and with entire effect.

The President. — Mr Carter, at the conclusion of this long and weighty argument, without presuming to express any opinion in reference to the merits of your case, I cannot refrain from expressing our acknowledgments of the lofty views which you have taken of the questions of general principle involved in your subject, and which you have developed before us. You have spoken in a language well worthy of this high court of peace between nations. You have spoken for mankind.

Mr Carter. — I am very much obliged, Mr President.

The President. — I understand that Mr Coudert is to follow.

Mr Coudert. — If it is your pleasure, I shall proceed at once.

The President. — No, if you please, we would rather ask you to wait until to-morrow.

The Tribunal accordingly adjourned until Wednesday, May 3, 1893, at 11. 30 o' clock.

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